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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

DOROTHY OWENS, as Conservator of Mary Francis King, an incapacitated person,

Petitioner,

v.

NATIONAL HEALTH CORPORATION d/b/a NHC HEALTHCARE, MURFREESBORO; NATIONAL HEALTHCORP, L.P.; NATIONAL HEALTH REALTY INC. a/k/a NHC, INC. – TENNESSEE; NHC/OP, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The defendants below, Respondents here, are the owners and operators of a nursing home that requires the execution of a pre-dispute arbitration clause waiving all rights to access to the courts and a jury trial as a condition of admission to their facility. Relevant federal statutes and regulations preclude the charging of "other consideration" outside that required by the State Medicare and Medicaid plan as a condition of admission to a nursing home. Mary King, the resident, was a Medicare recipient. Thus, the question presented in this petition is:

May a nursing home require a Medicare recipient to waive substantive rights by entering into a binding and mandatory pre-dispute arbitration clause as a condition of admission?

PARTIES TO THE PROCEEDING

The following plaintiff, Petitioner here, asserted claims in the trial court:

Dorothy Owens, as Conservator of Mary Francis King, an incapacitated person

The following individuals were defendants, Respondents here, in the trial court:

National Health Corporation d/b/a NHC Healthcare, Murfreesboro;

National Healthcorp, L.P.;

National Health Realty, Inc.;

NHC, Inc. a/k/a NHC, Inc. – Tennessee;

NHC/OP, L.P.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioner affirms that she has no parent company and is not a publicly-owned company.

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[1] The face of the order reads that it was issued on February 7, 2005, which is clearly a typographical error. The order was issued February 7, 2008.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is reprinted at App. 1. The opinion of the Tennessee Court of Appeals is reprinted at App. 31. Neither opinion is published.

JURISDICTION

The Tennessee Supreme Court issued its initial opinion in this case on November 8, 2007. A timely petition for rehearing was filed by Defendants and was granted in part and denied in part on February 7, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Portions of Title XIX of the Social Security Act and implementing regulations are relevant to the disposition of this case. The relevant statute reads as follows:

(5) Admissions Policy.

(A) Admissions. With respect to admissions practices, a nursing facility must –

. . .

(iii) in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii)

The relevant regulation reads as follows:

In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission, or continued stay in the facility.

42 C.F.R. § 483.12(d)(3)

INTRODUCTION

This case questions whether the words of Congress and the regulations governing nursing homes have meaning, or whether state courts may construe those words in such a manner as to frustrate the Congressional purpose. More specifically, the question is whether nursing homes may require the waiver of a substantive right as a condition of admission to a nursing home in the face of federal law precluding the giving of "other consideration" as a condition of admission. The Tennessee Supreme Court held that such a requirement is lawful. Whether it was right should be reviewed by this Court.

Where an individual is entitled to medical assistance through Medicare or Medicaid, a nursing facility must

> not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan . . . , any gift, money donation, or **other consideration as a precondition of admitting** . . . the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii) (emphasis added).

Furthermore, federal regulations provide as follows:

> In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under

> the State plan, any gift, money, donation, **or other consideration as a precondition of admission**, expedited admission, or continued stay in the facility.

42 C.F.R. § 483.12(d)(3) (emphasis added).

It is unquestionable that Tennessee law considers the waiver of a right to be consideration. *Bratton v. Bratton*, 136 S.W.3d 595 (Tenn. 2004). Indeed, under any common understanding of the word, giving up a right in exchange for some other product or service is "consideration." It is also unquestionable that Mary King, the resident whose rights were affected in this case, was a Medicare patient and would have been eligible for Medicaid. It is finally undisputed that Defendants required Ms. King, indeed all Medicare and Medicaid residents, to agree to mandatory binding arbitration as a condition of admission to their facility. Thus, the question is squarely presented in this case: may a nursing home require the waiver of a substantive right, in this case the right to access to the courts and a trial by jury, in exchange for admission to the nursing home?

The Tennessee Courts held that the nursing home could make arbitration a condition of admission relying on cases from other states that gave a very limiting construction to the term "consideration." *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983 (Ala. 2004); *Broughsville v. OHECC, LLC*, C.A. No. 05CA008672 (Ohio Ct. App. 2005) (unpublished opinion); *Sanford v. Castleton Health Care Center*,

813 N.E.2d 411 (Ind. Ct. App. 2004); *Gainesville Health Care Center, Inc.*, 857 So.2d 278 (Fla. Ct. App. 2003). According to the Tennessee Courts, the requirement that Mary King waive her right to a jury trial was not "consideration" within the meaning of federal law. The federal law, the Tennessee Courts apparently held, forbids only financial consideration.

Respectfully, this holding is perplexing. The Court of Appeals, whose opinion was essentially adopted by the Tennessee Supreme Court, held that waiving a jury trial was a waiver necessary to obtain the services Defendants were providing. Thus, it seems odd to hold later that the same waiver is not consideration as that term is used in federal law. Indeed, it fits the very definition of consideration: something bargained for in exchange, and nothing in the statute or regulation points to a different meaning. In fact, the use of the words "other consideration" indicates a broad meaning not a narrow one.

This question is important for the public and the legal profession, and it is squarely presented by this case. Congress has, by way of the Social Security Act and other measures regulating nursing homes, expressed a significant national interest in protecting the rights and safety of frail elderly residents of nursing homes. At the same time, the use of arbitration clauses in the admission process has become prevalent. Whether the interests of the nation and Congress is interfered with by requiring the waiver of substantive rights such as access to the courts and a

jury trial as a condition of admission is at stake in this case. That question merits review by this Court.

STATEMENT OF THE CASE

A. Factual Background.

This case is a nursing-home abuse-and-neglect case. Plaintiff is the conservator of Mary King. Plaintiff filed this lawsuit against Defendants for their negligent custodial care and treatment of Ms. King in the nursing home they owned and operated. This petition does not involve the merits of Plaintiff's complaint. The question is whether Plaintiff will be required to try her case before an arbitrator pursuant to an arbitration clause buried within Defendants' form admission agreement that was signed by persons not parties to this suit upon Mary King's admission to the nursing home. Stated more broadly, the issue is whether a nursing home may condition admission upon the waiver of a substantive right in the face of federal law precluding the charging of "other consideration" outside that allowed "State plan" as a condition of admission.

Mary King was admitted to Defendants' nursing home on August 26, 2003, by Gwen Daniel and John Willie Smith. The record does not reflect who Gwen Daniel or John Willie Smith are other than the fact that Gwen Daniel was granted a durable power of attorney for health care by Mary King on August 5, 2003. Likewise, nothing in the record explains why

Mary King did not sign the admission papers herself, other than an allegation in Plaintiff's complaint that Ms. King was incompetent from the beginning of her residency forward. Interestingly, Ms. King's admission to NHC Healthcare, Murfreesboro occurred just 21 days after she granted the durable power of attorney for health care.

As part of the admissions process, Gwen Daniel completed an "Admission and Financial Contract" ostensibly on behalf of Mary King. This document sets forth all manner of things including the services provided, the rates charged, payment arrangements, Medicare and Medicaid coverage, information releases and transfer and discharge rules. Then, on pages nine and 10 of this 11-page document, Defendants set forth their "Dispute Resolution Procedure" which includes a waiver of a jury trial and mandatory arbitration of claims. It is undisputed that agreeing to this provision is a condition of admission to the nursing home. It cannot be revoked independent of revocation of the entire admission agreement.

B. Proceedings Below.

Mary King's conservator, who is not the person who signed the admission agreement, filed this suit against Defendants because of the neglect and abuse suffered by Ms. King while in Defendants' nursing home. Rather than answer the complaint, Defendants moved to compel arbitration. Defendants' argument was that the durable power of attorney for health

care vested a person named Gwen Daniel, who is not a party to this suit, with the authority to waive Ms. King's right to access to the courts and a jury trial and consent to arbitration. Plaintiff disagreed, arguing that the durable power of attorney was not sufficient to vest such authority and that if it was, the clause was unenforceable for numerous reasons. One of those reasons was that requiring a nursing-home admittee to agree to arbitration as a condition of admission violates federal law because it is "other consideration" that a facility may not require. See Plaintiff's response to motion to stay and compel arbitration filed before the trial court. Thus, the federal question was raised at the earliest possible point in this litigation. The trial court held that Ms. Daniel lacked authority to enter into the arbitration clause, and also that the clause was incapable of enforcement due to the refusal of the entities named in the clause to administer the arbitration, the American Arbitration Association (AAA) and the American Health Lawyers Association (AHLA), to arbitrate the case. While the federal issue was raised, the trial court did not address it in its order.

The Tennessee Court of Appeals reversed the trial court's order. In the opinion of the Court of Appeals, the language of the durable power of attorney for health care was sufficient to vest Gwen Daniel with authority to waive Mary King's right to a jury trial because care at a nursing home is "medical care" and the arbitration clause in issue is a "waiver, release or other document" necessary to obtain that

medical care. *Owens v. National Health Corporation*, No. M2005-01272-COA-R3-CV, slip op. at 6 (Tenn. Ct. App. June 30, 2006) App. 41. Thus, the Court of Appeals read the language of the durable power of attorney broadly, giving it the greatest sweep possible. It rejected Plaintiff's argument that obtaining health care simply does not include waiving a right to a jury trial.

The federal question was specifically raised by Plaintiff and addressed by the Court of Appeals. The Court of Appeals rejected Plaintiff's arguments that the arbitration clause suffered from a facial infirmity in that it ran afoul of federal law by requiring "other consideration" besides the regular rate charged for nursing services. Slip op. at 7, App. 42. According to the Court of Appeals, requiring a resident to waive her right to a jury trial in order to obtain nursing services is not "consideration" as contemplated by federal law. Slip op. at 8, App. 44. This holding was made regardless of the previous holding that entering into the arbitration clause was a "waiver, release or other document" necessary to obtain nursing services from Defendants. The Court of Appeals rejected Plaintiff's other arguments as well.

Plaintiff applied for permission to appeal the Court of Appeals' opinion, which application was granted on November 20, 2006. Plaintiff again raised the federal issue before the Tennessee Supreme Court. After summarizing the issue and citing cases from other states addressing the issue, the Tennessee Supreme Court simply held that it agreed with the

Court of Appeals "that requiring a nursing-home admittee to agree to arbitrate a dispute with the nursing home is not equivalent to charging an additional fee or other consideration." *Owens v. National Health Corporation*, No. M2005-01272-SC-R11-CV, slip op. at 6 (Tenn. Nov. 8, 2007) App. 22.

Thus, to reiterate for purposes of Supreme Court Rule 14.1(g)(i), Plaintiff raised the federal issue for which review is sought at the earliest possible time before the trial court, in response to the motion to stay and compel arbitration. The issue was raised again before the Court of Appeals and again before the Tennessee Supreme Court. Thus, the question was timely and properly raised, and this Court has jurisdiction.

REASONS FOR GRANTING THE PETITION

THE TENNESSEE SUPREME COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This Court's Rules direct that "a petition for certiorari will be granted only for compelling reasons." S.Ct. Rule 10. One such compelling reason is where a state court of last resort "has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." S.Ct. Rule 10(c). This case is one such compelling case.

Certain points counseling for this Court's review are indisputable. First, as our nation has aged and found the need for long-term-care providers, nursing-home abuse and neglect has escalated. With that escalation has come the need to enact legislation and corresponding regulations to protect the rights of these vulnerable members of our society. The statute and the regulation at issue here are such measures. Their reach and effect are of critical importance both to residents and providers of long-term care.

As arbitration clauses are becoming more prevalent in nursing-home contracts, significant public interest is attached to defining the precise parameters in which parties must contain their actions in order for those clauses to be enforced, or, conversely, what is necessary to prevent an enfeebled nursing-home resident from waiving substantive rights, including the right to a trial by jury, when she is admitted to a long-term care facility. This interest is heightened in this case because this arbitration clause was a condition of admission to the facility rather than a collateral term supported by separate consideration. Whether federal law preventing the requirement of "other consideration" precludes this term is a significant issue of federal law meriting this Court's consideration.

Other state courts have decided the issue similarly to the Tennessee Supreme Court. However, no court including the Tennessee Supreme Court or Court of Appeals, has gone so far as to hold that agreeing to arbitration as a condition of admission is

not consideration. These courts have simply decided, with little or no analysis, that it is not the type of consideration contemplated by the federal statute or regulation. Thus, these courts have frustrated the purpose of the federal law by allowing what is admittedly "other consideration" to be charged for nursing-home admission. While it would be too much to argue that these holdings "conflict" with this Court's precedents directly, they do run counter to reasoning in important precedents in one respect: they reach far beyond placing arbitration agreements on the same footing as other contract terms and vary the term "consideration" in this context but in no other. Thus, this Court should accept this case to clarify whether this interpretation of the law of contracts is consistent with the expressed federal policy of disallowing "other consideration."

The federal agency charged with enforcing nursing-home regulations has avoided ruling on the issue, instead choosing to issue "guidance" that is at once ambiguous and contradictory. This "guidance" creates more questions that it answers. As a result, this Court is the final place for reasonable guidance on this important issue.

These issues are presented clearly and in a straightforward manner by this case. No extraneous or collateral questions mire the case. No one contests that the term is a condition of admission, and no one denies that Ms. King is entitled to protection of the statute and the regulation. This Court should take this opportunity to address these important issues in

this clear case. Each of these points is examined in greater detail below.

Our society is aging. As it does so, the need for long-term care increases. As of 2001, this nation had more than 15,000 nursing homes. Hornstein, *The Fiction of Freedom of Contract – Nursing Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law*, 16 St. Thom. L.Rev. 319 (2004) (hereafter *Fiction of Freedom of Contract*) (citing Gearon, *Marching for Quality Care*, AARP Bulletin May 2001)). The majority of that care is paid for by government entities and regulated by the federal government through the Medicare and Medicaid programs. Indeed, a 2002 report revealed that Medicare and Medicaid funds accounted for 58 percent of the total payment for nursing-home care in 2000, and another report revealed that more than 75 percent of the nation's facilities were certified by Medicare and Medicaid. Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 Elder L.J. 453, 460 n.47 (2006) (*Framing the Debate*) (citing Ctrs. for Medicare & Medicaid Servs., Program Info. on Medicare, Medicaid, SCHIP, and Other Programs of the Centers for Medicare and Medicaid Services 19 (2002), and Celia S. Gabrel, Nat'l Ctr. For Health Statistics, an Overview of Nursing Home Facilities: Data from the 1997 National Nursing Home Survey 2 (2000)).

With this increase in nursing-home care has come an increase in abuse and neglect. Even proponents of arbitration acknowledge this rise. Indeed,

one arbitration proponent wrote that "the sheer incidence of residents who have been harmed while under the care of nursing home caregivers indicates that all is not well in the long-term care industry." *Framing the Debate*, at 461-62. The same author noted that "from 1999 until the end of January 2005, the percentage of nursing homes cited for actual harm or immediate jeopardy in the United States ranged from 15.5% to 29.3%. *Id.* at 462 n.54 (citing Gen. Accounting Office, Nursing Homes: Despite Increased Oversight, Challenges Remain in Ensuring High-Quality Care and Resident Safety 60 tbl. 11 (2005)). Further reflecting this crisis in care is the reality of significant jury awards to victims of abuse and neglect. See Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263, 266-67 (2005) (hereafter *Do Not Belong*) (noting the increase in mean awards and some specific jury verdicts).

The federal government has acted to combat this abuse and neglect. As the United States District Court for the District of Columbia has acknowledged, "Congress has maintained a longstanding, continuing concern with the well being of America's elderly population. . . ." *Beverly Health and Rehabilitation Services v. Thompson*, 223 F.Supp.2d 73, 76 (D.D.C. 2002) (hereinafter *BHRS*). This concern led to oversight of nursing homes beginning with the 1935 Social Security Act and was expanded in 1965 with the creation of Medicare and Medicaid. *Ibid.* Criticism of the efficacy of government efforts resulted in a

major overhaul of the system by the Omnibus Budget Reconciliation Act of 1987 (OBRA). *Id.* at 76-77; H.R.Rep. No. 100-391(I), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-272. These measures obviously include the statutory provision at issue here.

OBRA required regulations to be promulgated and those regulations include the regulation at issue in this case. They were enacted in order to prevent the type of abuse and neglect noted above, but they go even further. See 42 C.F.R. § 483 *et seq*. These regulations are meant to provide nursing home residents "a dignified existence, self determination, and communication with and access to persons and services inside and outside the facility." 42 C.F.R. § 483.10. Section 483.10 also requires that nursing facilities "protect and promote" the rights of each resident, and section 483.10(a)(2) prohibits a nursing facility from interfering with a resident's exercise of his or her rights. These are all examples of the federal government's intent to protect residents not just from physical abuse, but from deprivations of rights as well. The regulations govern staffing levels, nutrition and hydration, turning and repositioning of residents to prevent pressure sores, and a plethora of other issues. They also govern admission practices.

The overhaul resulting in OBRA actually began with federal court litigation brought by nursing home residents. See *Estate of Smith v. O'Halloran*, 557 F.Supp. 289 (D.Colo. 1983), *rev'd sub nom., Estate of Smith v. Heckler*, 747 F.2d 583 (10th Cir. 1984). In *Smith*, nursing home residents expressed their dissatisfaction with

Department of Human Services (HHS) and Health Care Financing Administration (HCFA) efforts at nursing home oversight by filing a class action "to require the agency to meet its statutory duty to provide residents of nursing homes with adequate care." *BHRS*, 223 F.Supp.2d at 77. Reversing the district court, the Tenth Circuit Court of Appeals issued an order mandating that HHS "promulgate regulations which will enable [it] to be informed as to whether the nursing facilities receiving federal Medicaid funds are actually providing high quality medical care." *Id.* at 591 (emphasis added). On remand, the district court continued this theme of requiring HHS to promulgate regulations writing "the Secretary must establish uniform standards for facility performance and a uniform methodology for evaluating that performance to ensure the delivery of high quality health care." *Estate of Smith v. Bowen*, 675 F.Supp. 586, 589 (D.Colo. 1987).

As *Smith* was winding its way through the courts, "Congress and HCFA increased their focus on remedying the serious deficiencies in the nursing home regulatory system." *BHRS*, 223 F.Supp.2d at 78. HCFA contracted with the Institute of Medicine (IOM) to study the nation's nursing home care. HCFA's concern was that nursing homes were not providing "a sufficient level of care" and that enforcement was lacking. *Ibid.* In 1986, IOM published its highly-critical report of the nursing home industry, *Improving Quality of Care in Nursing Homes*. It also made certain recommendations focused upon standards of care including

the need for appropriate assessment, development of treatment plans, and execution of treatment plans. *Ibid.*

These efforts culminated with the passage of OBRA on December 22, 1987. OBRA required HHS to promulgate rules and regulations to effectuate its purpose, including the regulation at issue in this case. Those rules and regulations are found at 42 C.F.R. §§ 483.1-483.75 and became effective on October 1, 1990.

So what is the relevance of this discussion for the issue raised by this case? It is as simple as this: the statute and the regulation at issue here are designed as part of a comprehensive package to protect frail nursing-home admittees from abuse and overreaching by nursing-home companies. It accentuates the importance of the issue needing definitive clarification. The question is whether the words of Congress and federal regulators mean what they say or whether they may be construed in such a manner as to require the waiver of a substantive right in order to gain admission to a nursing home. This Court should issue the writ to decide this important issue.

At the same time, arbitration clauses are becoming more prevalent in nursing-home admission agreements. While precise numbers are unavailable, what is clear from the scholarship is that arbitration clauses are common and that litigation abounds over the boundaries of enforceability. *Framing the Debate*, *supra*; *Fiction of Freedom of Contract*, *supra*; *Do Not*

Belong, *supra*; Gallagher, *Mandatory Arbitration Clauses in Nursing Home Admission Agreements: the Rights of Elders*, 3 NEALA J. 187 (2007). Resolving this issue will bring clarity to the debate at least on this one point. This Court should do so.

One state supreme court and three state appellate courts have thus far passed on this issue in addition to the Tennessee courts. *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983 (Ala. 2004); *Broughsville v. OHECC, LLC*, C.A. No. 05CA008672 (Ohio Ct. App. 2005) (unpublished opinion); *Sanford v. Castleton Health Care Center*, 813 N.E.2d 411 (Ind. Ct. App. 2004); *Gainesville Health Care Center, Inc.*, 857 So.2d 278 (Fla. Ct. App. 2003). The reasoning of each is similar both in the conclusion and in the brevity: the "other consideration" referred to in the statute does not include waiving access to the courts and a jury trial. The only real "reasoning" employed in any of these opinions is the use of *ejusdem generis* to conclude that "other consideration" must mean financial consideration. *Castleton*, 813 N.E.2d at 419.

Respectfully, these courts missed two important points. First, they never even analyzed the important Congressional purpose behind the statute and the regulations. As discussed above, Congress' long-standing interest in protecting the rights and safety of the elderly led to these provisions, and surely the provisions mean what they say. If Congress had meant "other consideration" to be "financial consideration" it would have said so. It did not. It directed that no "other consideration" may be required for

admission or to remain in a facility. At minimum, something more than a holding that "Congress must not have meant this consideration when it wrote other consideration" is needed to guide both residents and facilities. The Tennessee decision, like other state-court decisions, frustrates Congressional intent and should be reviewed by this Court.

In similar fashion, the state-court opinions, including the Tennessee opinions, fail to take cognizance of the fact that modern arbitration statutes are meant to place arbitration clauses on the same footing as other contract terms and reverse judicial hostility toward arbitration clauses. See, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Volt Info. Sci., Inc. v. Board of Trustees of LeLand Stanford Junior Univ.*, 489 U.S. 468 (1989). These opinions go much further. They hold that the common contract term "consideration" has a different meaning in the context of this statute and this regulation at least where applied to a mandatory arbitration clause that is a condition of admission. They do not, however, explain in any detailed manner why it has a different meaning. Again, this failure leads parties to wonder what the boundaries are with respect to the federal laws, and frustrates the purpose behind the statute and the regulation.

Finally, it is worth noting that the federal agency charged with providing guidance to nursing-home regulators failed to give any guidance on this topic. In a 1995 memorandum, the Centers for Medicare and Medicaid Services (CMS) wrote that "there may be

consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements." *Do Not Belong*, at 289 (quoting Memorandum from the Centers for Medicare & Medicaid Services to the Survey and Certification Group Regional Office Management (G-5) State Survey Agency Directors (Jan. 9, 2003)). The memorandum goes on to note that "a facility may subject itself to an enforcement action of it retaliates against or discharges residents for refusing to sign an arbitration agreement, actions that clearly violate the regulations." *Ibid.* Thus, the memorandum clearly directs that a resident cannot be discharged for not signing an arbitration clause but is at best "evasive and equivocating," *ibid*, with respect to whether a clause may be required as a condition of admission.

Thus, the need for this Court to exercise its discretion and review this case is clear. Congress and federal regulations forbid, in absolute terms, the charging of "other consideration" for admission to a nursing home, yet state courts of last resort, including the Tennessee Supreme Court, allow nursing homes to require the execution of a mandatory arbitration clause as a condition of admission. The only explanation given for this allowance is the conclusory holding that giving up a right is not what the term "other consideration" means. One wonders if the holding would be the same if residents were required to forego counsel, or give up the right to speak freely, or waive a specific right guaranteed to nursing home residents such as the physician of their choice. Under

the reasoning of the Tennessee Supreme Court and other state courts, that would be the result.

This Court should issue the writ and address this important issue. The future does not hold fewer nursing-home residents, it holds more. Whether the words of Congress mean what they say, and the rights of those residents, hang in the balance. The writ should issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

May 2, 2008

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
June 6, 2007 Session

DOROTHY OWENS, as Conservator of MARY FRANCIS KING, an incapacitated person v. NATIONAL HEALTH CORPORATION ET AL.

Appeal by Permission from the Court of Appeals, Middle Section Circuit Court for Rutherford County No. 51377 Robert E. Corlew, Chancellor

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No. M2005-01272-SC-R11-CV – Filed November 8, 2007

Tenn. R. App. P. 11 Appeal By Permission; Judgment of the Court of Appeals Affirmed in Part and Vacated in Part; Case Remanded to the Trial Court for Further Proceedings.

JANICE M. HOLDER, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and CORNELIA A. CLARK and GARY R. WADE, JJ., joined.

Richard E. Circeo, Deborah Truby Riordan, and Carey L. Acerra, Nashville, Tennessee, and Brian G. Brooks, Greenbrier, Arkansas, for the appellant, Dorothy Owens, as Conservator of Mary Francis King.

John B. Curtis, Jr. and Bruce D. Gill, Chattanooga, Tennessee, for the appellees, National Health Corporation d/b/a NHC Healthcare, Murfreesboro; National Healthcorp, L.P.; National Health Realty, Inc.; NHC, Inc. a/k/a NHC, Inc.-Tennessee; and NHC/OP, L.P.

F. Laurens Brock, Jacob C. Parker, and T. Ryan Malone, Chattanooga, Tennessee, and Christopher C. Puri, Nashville, Tennessee, for the amicus curiae, Tennessee Health Care Association.

OPINION

FACTS AND PROCEDURAL HISTORY

On August 5, 2003, Mary Francis King ("King") executed a Durable Power of Attorney for Health Care ("the power of attorney") naming Gwyn C. Daniel ("Daniel") and William T. Daniel as King's attorneys-in-fact. The power of attorney authorized the attorneys-in-fact "to ASSIST me in making health care decisions, and to make health care decision [sic] for me if I am incapacitated or otherwise unable to make such decisions for myself." The power of attorney then set out two paragraphs that are based substantially upon similar provisions in the statutory form for a living will. *See* Tenn. Code Ann. § 32-11-105 (2001). Those two paragraphs provide directions to King's attorneys-in-fact concerning her care in the

event she were to have "a terminal condition, or be in an irreversible coma or permanent vegetative state."[1]

The power of attorney further provided:

> At any time, my Attorney-in-Fact shall have the right to examine my medical records and to consent to their disclosure whether I am incapacitated or not. I grant to my Attorney-in-Fact the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my

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[1] It should be noted that a living will and a durable power of attorney for health care are two different legal instruments. A living will, prepared and executed pursuant to the Tennessee Right to Natural Death Act, sections 32-11-101 to -112 (2001 and Supp. 2006), is "a written declaration . . . stating declarant's desires for medical care or noncare, including palliative care, and other related matters such as organ donation and body disposal." Tenn. Code Ann. § 32-11-103(4) (2001). A living will, therefore, is a written statement of the patient's *own* health care decisions regarding his or her medical care in the event he or she has a terminal condition and becomes incompetent; in such circumstances, health care providers may rely upon the living will and implement the patient's decisions set out in that instrument. By contrast, a durable power of attorney for health care, governed by Tennessee Code Annotated sections 34-6-201 to -218 (2001 and Supp. 2006), is a document authorizing *another* person (an attorney-in-fact) to make health care decisions on behalf of the patient in the event he or she becomes incapacitated. Given their different purposes, a person may execute a living will, a durable power of attorney for health care, or both.

> Attorney-in-Fact to assist me to make, or to make on my behalf.
>
> This instrument is to be construed and interpreted as a Durable Power of Attorney for Health Care and is intended to comply in all respects with the provisions of Tennessee Code Annotated, § 34-6-201 *et seq.*; and all terms used in this instrument shall have the meanings set forth for such terms in the statute, unless otherwise specifically defined herein.

On August 26, 2003, three weeks after executing the power of attorney, King was admitted to NHC Healthcare, Murfreesboro, a nursing home owned, operated, and managed by the various defendants. The Admission and Financial Contract listed "Gwen [sic] Daniel" as "Legal Representative" and indicated that the "Type" of legal representative was "Power of Attorney." The contract was signed by Daniel and by John Willie Smith ("Smith"), King's brother. Smith is not named in the power of attorney, and no other document in the record authorizes him to make decisions on behalf of his sister.

Section H of the eleven-page contract is entitled "DISPUTE RESOLUTION PROCEDURE (WHICH INCLUDES JURY TRIAL WAIVER)." Section H, which is one-and-one-half pages long, contains three numbered provisions. Section H(1) sets out an "INITIAL GRIEVANCE PROCEDURE" and states that "[t]he parties agree to follow the Grievance procedures described in the Patient Rights Booklet for any

claim, controversy, dispute or disagreement arising out of or in connection with the care rendered to Patient by Center and/or its employees." Section H(2) is entitled "MEDIATION AT PATIENT'S REQUEST," and it provides that the patient may request mediation of "any claim, controversy, dispute or disagreement arising out of or relating to . . . this contract or breach thereof or any tort claim." The mediation provision further provides that "[f]ailure by the Patient to request or pursue mediation prior to activation of the arbitration process shall terminate Patient's right to mediation."

Section H(3) of the contract is entitled "BINDING ARBITRATION." This section of the contract provides, in pertinent part:

> **BINDING ARBITRATION:** Any claim, controversy, dispute or disagreement initiated by either party prior to written notice of mediation, shall be resolved by binding arbitration administered by either the American Arbitration Association (AAA) or the American Health Lawyers Association (AHLA), as selected by the party requesting arbitration. In the event that the selected arbitration service is unwilling or unable to serve as arbitrator, the other named service shall be utilized. The judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
>
> . . . .

> This agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed. . . .
>
> **BY AGREEING TO ARBITRATION OF ALL DISPUTES, BOTH PARTIES ARE WAIVING A JURY TRIAL FOR ALL CONTRACT, TORT, STATUTORY, AND OTHER CLAIMS.**

Section H concludes with a separate signature box containing the following text:

> **I hereby agree to the arbitration provisions described above in Section H, including the use where applicable of the AAA Defined "Consumer-Related Disputes." The provisions of Section H have been explained to me prior to my signature below and I also understand that I waive my right to trial by jury.**

Following that text are signature lines for "Patient Signature" (left blank in this contract), "Legal Representative Signature" (signed by Daniel), "Additional Signature (if applicable)" (signed by Smith), and "Date" (written as "8/26/03").

The last section of the contract, Section L ("ACKNOWLEDGEMENT" [sic]), is followed by a signature line for a representative of the nursing home and signature lines for the patient and "Other Persons Signing on Behalf of Patient." The patient's signature line on King's contract was left blank, and Daniel and

Smith signed on the two signature lines provided for "Other Persons Signing on Behalf of Patient."

On February 10, 2005, Dorothy Owens ("the plaintiff"), as conservator of King, filed suit against National Health Corporation d/b/a NHC Healthcare, Murfreesboro; National Healthcorp, L.P.; National Health Realty, Inc.; NHC, Inc. a/k/a NHC, Inc.-Tennessee; and NHC/OP, L.P. (collectively, "the defendants"). The complaint alleges that King suffered injuries as the result of the acts or omissions of the defendants while a patient in the nursing home. The complaint asserts causes of action for negligence; gross negligence; wilful, wanton, reckless, malicious and/or intentional conduct; medical malpractice; and violations of the Tennessee Adult Protection Act, Tennessee Code Annotated sections 71-6-101 to -122. The complaint asks for an unspecified amount of compensatory and punitive damages and "demands a trial by jury on all issues herein set forth."

On March 17, 2005, the defendants filed a motion to compel arbitration and stay proceedings. The defendants' motion asked the trial court to compel arbitration based upon the terms of the nursing home contract signed by Daniel as King's attorney-in-fact, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-316 (1999), Tennessee Code Annotated section 29-5-217 (2000), and the Tennessee Uniform Arbitration Act, Tennessee Code Annotated section 29-5-303 (2000).

Responding to the defendants' motion to compel arbitration, the plaintiff asserted, in summary, that Daniel was not authorized by the power of attorney to enter into an arbitration agreement on King's behalf; that the arbitration agreement cannot be enforced because the two identified arbitration organizations no longer perform this type of arbitration; that requiring Daniel, on behalf of King, to sign the arbitration agreement amounts to a breach of the defendants' alleged fiduciary duty to King; that the arbitration agreement is unconscionable; and that the arbitration agreement violates federal law. In the alternative, the plaintiff asserted that she should be permitted to conduct discovery concerning the issues arising from the arbitration agreement.

The trial court denied the defendants' motion to compel arbitration and stay the proceedings. The trial court concluded that the power of attorney does not authorize the attorneys-in-fact to make "legal decisions for Ms. King" and found "that the Durable Power of Attorney for Healthcare should not be so broadly construed as to be considered a Power of Attorney for legal care."

The defendants filed a timely notice of appeal of the trial court's ruling to the Court of Appeals. The defendants' notice of appeal states that the matter is

being appealed pursuant to Tennessee Code Annotated section 29-5-319.[2]

The Court of Appeals reversed the trial court's ruling, concluding that the power of attorney authorized Daniel to make health care decisions on behalf of King and that the decision to admit King to a nursing home is a health care decision. The intermediate appellate court concluded that the arbitration provision of the nursing-home contract was merely part of the overall contract that Daniel was authorized to execute on behalf of King. The Court of Appeals also rejected the plaintiff's various other arguments and remanded the case to the trial court with instructions to enter an order compelling arbitration.

We granted the plaintiff's application for permission to appeal. For the reasons stated below, we affirm in part and vacate in part the judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

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[2] Section 29-5-319(a)(1) states that an appeal may be taken from "[a]n order denying an application to compel arbitration made under § 29-5-303." Tenn. Code Ann. § 29-5-319(a)(1) (2000). Section 29-5-319(b) further provides that "[t]he appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action." *Id.* § 29-5-319(b) (2000). The federal act contains a comparable provision. *See* 9 U.S.C. § 16 (1999) ("Appeals").

DISCUSSION

The plaintiff raises six issues for the Court's review. Those six issues may be restated as follows: 1) whether this case is governed by the state or federal arbitration act; 2) whether King's durable power of attorney for health care authorized her attorneys-in-fact to bind King to arbitration and to waive her right to trial by jury; 3) whether the arbitration agreement is enforceable even though a material term of the agreement is incapable of performance; 4) whether the arbitration agreement violates federal law; 5) whether pre-dispute arbitration agreements in nursing-home contracts violate public policy; and 6) assuming arguendo that the power of attorney authorizes Daniel to sign the arbitration agreement on behalf of King, whether the Court of Appeals erred in failing to remand the case for discovery regarding the plaintiff's assertions that the agreement is unenforceable on breach-of-fiduciary-duty and unconscionability grounds. The issues in this case are questions of law, which we review de novo without a presumption of correctness afforded to the trial court's conclusions. *See Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). We will address each of these issues in turn.

A. Federal or State Law

The first question we must consider is whether this case is governed by the Federal Arbitration Act or the Tennessee Uniform Arbitration Act. The

defendants argue that this case is governed by the federal act because the contract involves interstate commerce. *See* 9 U.S.C. § 2 (1999). Where the requisite connection with commerce is present, the federal act generally requires a court to stay the proceedings so the parties can resolve the dispute according to the terms of the arbitration agreement. *See* 9 U.S.C. § 3 (1999). The record contains an affidavit of a nursing-home administrator detailing the various ways in which interstate commerce is involved, e.g., the nursing home uses supplies and goods procured from outside Tennessee, admits residents of states other than Tennessee, and participates in the federally funded Medicare and Medicaid programs.

The plaintiff argues in response that even if interstate commerce is involved, the terms of the nursing-home contract provide that the arbitration agreement is to be governed by the Tennessee act. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468 (1989). Under *Volt,* parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate, and a contract that might ordinarily be governed by the federal act may provide that it will be governed by a particular state's arbitration act. *Id.* at 479.

We need not belabor our analysis on this point because Section H(3), the arbitration provision within the nursing-home contract, expressly provides that "this agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed." It is

undisputed that NHC Healthcare, Murfreesboro is licensed in Tennessee. Therefore, that language does not merely provide that issues of substantive law are to be determined by reference to Tennessee law; it clearly provides that the arbitration agreement itself "shall be governed by and interpreted" in accordance with the laws of Tennessee. Applying *Volt,* we must conclude that this case is governed by the Tennessee Uniform Arbitration Act and not the Federal Arbitration Act.

B. Scope of Authority Granted To Attorneys-In-Fact

The question of whether the contract is governed by the state or federal arbitration act is not an academic one. The resolution of that question generally determines whether certain issues concerning the arbitration agreement are to be decided by an arbitrator or by a court. *See Frizell Constr. Co. v. Gatlinburg, L.L.C.,* 9 S.W.3d 79 (Tenn. 1999). Because this arbitration agreement is to be interpreted in accordance with the Tennessee act, contract formation questions are to be decided by the court, not by an arbitrator. *Id.* at 85. Consequently, we next consider whether King's power of attorney authorizes Daniel to sign an arbitration agreement on King's behalf and to waive King's right to trial by jury. The plaintiff argues that the decision to sign an arbitration agreement and to waive a jury trial is a *legal* decision, not a *health care* decision. Accordingly, she asserts that the power of attorney does not authorize Daniel to

bind King to arbitration. We begin our analysis with an examination of the language of King's power of attorney.

King's power of attorney authorizes her attorneys-in-fact "to make health care decision [sic] for me if I am incapacitated or otherwise unable to make such decisions for myself" and also grants her attorneys-in-fact "the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my Attorney-in-Fact to assist me to make, or to make on my behalf." Additionally, the power of attorney provides that it

> is to be construed and interpreted as a Durable Power of Attorney for Health Care and is intended to comply in all respects with the provisions of Tennessee Code Annotated, § 34-6-201 et seq.; and all terms used in this instrument shall have the meanings set forth for such terms in the statute, unless otherwise specifically defined herein.

Tennessee Code Annotated section 34-6-201(2) (2001) defines "[h]ealth care" to mean "any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition, and includes medical care as defined in § 32-11-103(5)." Section 34-6-201 then defines "[h]ealth care decision" to mean "consent, refusal of consent or withdrawal of consent to health care." Tenn. Code Ann. § 34-6-201(3) (2001). Under these two statutory

definitions, the decision to admit King to the nursing home clearly constitutes a "health care decision."

> Section 34-6-204(b) (2001) provides:
>
> Subject to any limitations in the durable power of attorney for health care, the attorney in fact designated in such durable power of attorney may make health care decisions for the principal, before or after the death of the principal, *to the same extent as the principal* could make health care decisions for such principal if the principal had the capacity to do so. . . .

(emphasis added).

As stated in *American Jurisprudence,* "[p]owers of attorney are to be construed in accordance with the rules for the interpretation of written instruments generally; in accordance with the principles governing the law of agency, and, in the absence of proof to the contrary, *in accordance with the prevailing laws relating to the act authorized.*" 3 Am. Jur. 2d Agency, § 27 (2007) (emphasis added) (footnotes omitted). In this case, King's power of attorney must be construed in accordance with the foregoing provisions of the Tennessee Durable Power of Attorney for Health Care Act.

The phrase "to the same extent as the principal" as used in section 34-6-204(b) clearly indicates that, absent a limitation in the power of attorney, an attorney-in-fact can make exactly the same types of health care decisions that the principal could make if

he or she had the mental capacity to do so. That statute, read in light of the statutory definitions mentioned above, leads to the conclusion that an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing-home contract that contains an arbitration provision because this action is necessary to "consent . . . to health care." Tenn. Code Ann. § 34-6-201(3). Because King herself could have decided to sign the nursing-home contract containing the arbitration provision had she been capable, section 34-6-204(b) leads us to conclude that Daniel was authorized to sign the arbitration provision on King's behalf. As a result, the plaintiff's argument that the power of attorney did not authorize Daniel to sign the arbitration agreement is without merit.

The plaintiff's argument on this issue is faulty in at least one other respect. Her purported distinction between making a legal decision and a health care decision fails to appreciate that signing a contract for health care services, even one without an arbitration provision, is itself a "legal decision." The implication of the plaintiff's argument is that the attorney-in-fact may make one "legal decision," contracting for health care services for the principal, but not another, agreeing in the contract to binding arbitration. That result would be untenable. Each provision of a contract signed by an attorney-in-fact could be subject to question as to whether the provision constitutes an authorized "health care decision" or an unauthorized "legal decision." Holding that an attorney-in-fact can

make some "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by attorneys-in-fact that likely would have negative effects on their principals. Such a holding could make it more difficult to obtain health care services for the principal. And in some cases, an attorney-in-fact's apparent lack of authority to sign an arbitration agreement on behalf of the principal presumably could result in the principal being unable to obtain needed health care services. For example, a mentally incapacitated principal could be caught in "legal limbo." The principal would not have the capacity to enter into a contract, and the attorney-in-fact would not be authorized to do so. Such a result would defeat the very purpose of a durable power of attorney for health care.

Our holding on this issue is necessarily based upon both the language of King's power of attorney and the provisions of the Tennessee Durable Power of Attorney for Health Care Act. Our holding, however, is consistent with cases from other jurisdictions considering the issue. *See, e.g., Briarcliff Nursing Home, Inc. v. Turcotte,* 894 So.2d 661 (Ala. 2004); *Hogan v. Country Villa Health Servs.,* 55 Cal. Rptr. 3d 450, 453-55 (Cal. Ct. App. 2007) (citing *Garrison v. Superior Court of Los Angeles County,* 33 Cal. Rptr. 3d 350 (Cal. Ct. App. 2005)); *Sanford v. Castleton Health Care Ctr., L.L.C.,* 813 N.E.2d 411 (Ind. Ct. App. 2004). *But see Texas Cityview Care Ctr., L.P. v. Fryer,* Nos. 2-06-373-CV, 2-06-426-CV, 2007 WL 1502088, *5 (Tex. Ct. App. May 24, 2007) (stating

"nothing in the medical power of attorney indicates that it was intended to confer authority on [the attorney-in-fact] to make legal, as opposed to health care, decisions for [the principal], such as whether to waive [the principal's] right to a jury trial by agreeing to arbitration of any disputes").

For the reasons stated above, we must reject the plaintiff's argument that King's power of attorney does not authorize Daniel to sign the arbitration agreement and thereby to waive King's right to trial by jury. We hold that Daniel was authorized to sign the nursing-home contract, including its arbitration provision. This holding, however, does not resolve the plaintiff's other issues as to whether the arbitration agreement is enforceable.

C. Impossibility of Performance of a Material Term

The plaintiff asserts that the arbitration provision of the nursing-home contract is unenforceable because the two arbitration organizations mentioned in Section H(3), the American Arbitration Association and the American Health Lawyers Association, no longer conduct arbitrations in which the agreement to arbitrate predates the dispute which is the subject of the claim ("pre-dispute arbitration agreement"). The defendants apparently do not dispute the plaintiff's assertion that the two organizations no longer conduct arbitrations under the terms of pre-dispute arbitration agreements in health care cases. They argue, however, that both the federal and state arbitration acts

provide for instances in which an arbitrator specified in the arbitration agreement is unavailable to conduct the arbitration. *See* 9 U.S.C. § 5 (1999); Tenn. Code Ann. § 29-5-304 (2000).

The Court of Appeals rejected the plaintiff's argument and agreed with the defendants' position, citing Tennessee Code Annotated section 29-5-304. That section provides:

> If the arbitration agreement provided a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

As the Court of Appeals correctly concluded, section 29-5-304 provides for the very contingency illustrated by the facts of this case. When an agreed-upon arbitrator is unavailable, the court may appoint one or more arbitrators to conduct the arbitration.

The plaintiff asserts in this Court that the intermediate appellate court misconstrued her argument on this issue. Notwithstanding section 29-5-304, the plaintiff argues that the specification of the two arbitration organizations was such a material term of the contract that the contract itself must fail if

neither of those organizations is available to conduct the arbitration.

The plaintiff's argument on this issue is without merit. First, there simply is no factual basis for the plaintiff's assertion that the specification of the two organizations was so material to the contract that it must fail if they are unavailable. Second, it appears that at least one of the two specified organizations *will* conduct the arbitration *if ordered by a court to do so. See* AHLA Dispute Resolution Service Important Rules Amendment, American Health Lawyers Association, http://www.healthlawyers.org/Template.cfm?Section=About_Arbitration_and_Mediation_Services (follow hyperlink "Important Rules Amendment") (last visited August 1, 2007) (stating, in footnote 2, "[i]f a judge gives a written order that the AHLA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHLA ADR Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter."); *Owens v. Nexion Health at Gilmer, Inc.*, No. 2:06-CV-519-DF, 2007 WL 841114, *3 (E.D. Tex. Mar. 19, 2007) ("[T]he AHLA rules specifically provide that the AHLA Dispute Resolution Service *will* administer a consumer health care liability claim if 'a judge orders that the Service administer an arbitration under the terms of a pre-injury arbitration agreement.' Therefore, this Court may enforce the Arbitration Agreement as written."). Thus, the plaintiff's argument is based upon the false factual premise that neither

organization is available to conduct an arbitration in this case. It appears that the AHLA will conduct the arbitration if ordered by a court to do so.

For the foregoing reasons, the plaintiff's argument that the contract is void because a material term is incapable of performance is without merit.

D. Violation of Federal Law

The plaintiff argues that the arbitration agreement in the nursing-home contract violates federal law. Her argument is based upon both a federal statute and a federal regulation.

Section 1396r(c)(5)(A)(iii) of title 42 of the United States Code provides that a nursing facility that participates in the federal Medicaid program must,

> in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money, donation, *or other consideration* as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii) (Supp. 2007) (emphasis added). Similarly, section 483.12(d)(3) of title 42 of the Code of Federal Regulations provides:

> In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, *or other consideration* as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3) (2006) (emphasis added).

The plaintiff argues that the waiver of a right to trial by jury constitutes a form of "other consideration" prohibited by the federal statute and regulation. The plaintiff therefore contends that it is illegal to require a patient to sign an arbitration agreement waiving the right to a jury trial as a precondition for being admitted to a nursing home.

Courts in several other jurisdictions have rejected this argument. In *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983 (Ala. 2004), the Alabama Supreme Court stated:

> [R]equiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance. Rather, an arbitration agreement sets a forum for future disputes; *both* parties are bound to it and *both* receive whatever benefits and detriments accompany the arbitral forum. If we were to agree with [the plaintiff], virtually any contract term [the plaintiff] decided she did not like could be construed as requiring "other consideration" in order to gain

> admittance to the nursing home and thus be disallowed by statute.

Id. at 989. *See also Sanford,* 813 N.E.2d at 419 (concluding that the general phrase "other consideration" within 42 U.S.C. § 1396r(c)(5)(A)(iii) did not include an agreement to arbitrate and that requiring a nursing-home admittee to agree to arbitrate did not violate the statute); *Gainesville Health Care Ctr., Inc. v. Weston,* 857 So.2d 278, 288 (Fla. Dist. Ct. App. 2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."); *Broughsville v. OHECC, L.L.C.,* No. 05CA008672, 2005 WL 3483777, *8 (Ohio Ct. App. Dec. 21, 2005) (stating that requiring a nursing-home admittee receiving Medicare or Medicaid to agree to arbitrate is not charging an additional fee or other consideration).

Relying on *Coosa Valley Health Care, Broughsville,* and *Sanford,* the Court of Appeals concluded that requiring a nursing-home admittee to agree to arbitrate a dispute with the nursing home is not equivalent to charging an additional fee or other consideration. We agree with the intermediate appellate court's analysis and hold that the arbitration agreement in King's nursing-home contract did not violate either the federal statute or the federal regulation.

E. Pre-Dispute Arbitration Agreements in Nursing-Home Contracts and Public Policy

In *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996), we held that arbitration agreements between physicians and patients are not per se invalid as a matter of public policy. The plaintiff in the pending case, however, asks us to hold that pre-dispute arbitration agreements in nursing-home contracts violate public policy. The plaintiff asserts that such a holding would not be inconsistent with *Buraczynski* because as we stated in that case:

> [C]ourts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden within other types of contracts and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment, and when the agreements give the healthcare provider an unequal advantage in the arbitration process itself.

Id. at 321. The plaintiff asserts that three of the foregoing factors stated in *Buraczynski* are implicated in every nursing-home contract containing an arbitration clause.

In arguing that pre-dispute arbitration agreements in nursing home contracts violate public policy, the plaintiff relies primarily upon the "Heathcare

Due Process Protocol" adopted by the American Arbitration Association. *See* "Healthcare Due Process Protocol," American Arbitration Association/American Bar Association/American Medical Association Commission on Healthcare Dispute Resolution, Final Report, July 27, 1998, *available at* http://www.adr.org/sp.asp?id=28633 (last visited August 1, 2007). In support of her argument on this issue, the plaintiff quotes several portions of the Due Process Protocol that state that binding forms of alternative dispute resolution ("ADR") should be used only where the parties agree to do so *after* a dispute arises and that consent to use an ADR process should not be a requirement for receiving emergency care or treatment. The plaintiff goes on to assert that the admission of patients to nursing homes is analogous to "emergency care or treatment" and that consent to use arbitration therefore should not be a requirement for admission to a nursing home.

The Due Process Protocol relied upon by the plaintiff does not apply to nursing-home contracts. By its express terms, the Due Process Protocol applies only in the context of disputes arising between patients and their *private managed-care plans*. Due Process Protocol, Paragraphs I ("Introduction") and II ("Summary of Recommendations"). Notwithstanding the limited scope of the Due Process Protocol, one could argue that one or more of the general principles stated in the Protocol might be equally applicable in health care settings other than the managed-care setting. None of those general principles, however,

would support a holding that pre-dispute arbitration agreements in nursing-home contracts are per se invalid on public policy grounds. Such a holding would amount to a public-policy "exception" to the Tennessee Uniform Arbitration Act, a matter more properly within the purview of the General Assembly.

For the foregoing reasons, we reject the plaintiff's assertion that pre-dispute arbitration agreements in nursing-home contracts are per se invalid because they violate public policy.

F. Remand for Discovery

The trial court's ruling that the power of attorney does not authorize Daniel to bind King to arbitration pretermitted the issue of whether the nursing-home contract is a contract of adhesion and, if so, whether it is unenforceable on the ground that it is unconscionable. If this Court holds that the power of attorney authorized Daniel to sign the arbitration agreement, the plaintiff asserts that the Court of Appeals erred in not remanding the case to the trial court to permit the plaintiff to conduct discovery concerning this claim. She argues that the determination of unconscionability is fact driven and that she should be permitted to develop the factual record before the court decides that issue. The plaintiff

points out that the defendants have not yet responded to her previously filed discovery requests.[3]

A contract may be unconscionable if the provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice. *Haun v. King,* 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (quoting *Brenner v. Little Red Sch. House, Ltd.,* 274 S.E.2d 206, 210 (N.C. 1981)). In making that determination, a court must consider all the facts and circumstances of a particular case. *Id.* The scant factual record in this case does not disclose the circumstances under which Daniel signed the arbitration agreement on behalf of King, including whether the arbitration agreement was offered on a "take it or leave it basis." *Buraczynski,* 919 S.W.2d at 320; *see generally Howell v. NHC Healthcare-Fort Sanders, Inc.,* 109 S.W.3d 731 (Tenn. Ct. App. 2003) (reviewing the trial court's findings of fact and holding that an arbitration provision in a nursing-home contract was unconscionable and therefore unenforceable).

We are unable to resolve the question of whether the arbitration agreement is unconscionable due to the limited nature of the factual record. We therefore conclude that the case should be remanded to the trial court for further proceedings on that issue. The

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[3] Based upon our review of the record, it appears that the plaintiff served upon the defendants two sets of interrogatories and four sets of requests for production of documents while the case was pending in the trial court.

trial court, in its discretion, may allow the parties to conduct discovery.[4] *See Berger v. Cantor Fitzgerald Sec.*, 942 F. Supp. 963, 966 (S.D.N.Y. 1996) (allowing discovery concerning arbitration agreement and enforceability issues). We express no opinion, however, as to the ultimate resolution of the unconscionability issue.

The plaintiff also asserts in her brief that she should be permitted to conduct discovery on the question of whether the agreement is unenforceable because it allegedly constitutes a breach of fiduciary duty. The Court of Appeals rejected the plaintiff's argument that the agreement is unenforceable under her breach-of-fiduciary-duty theory. We agree with the result reached by the intermediate appellate court on that issue, albeit on different grounds.

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[4] The plaintiff also questions whether King was incompetent to sign the nursing-home agreement when Daniel executed the contract pursuant to the power of attorney. The plaintiff asserts that the trial court should have permitted discovery regarding the circumstances surrounding the execution of both the nursing-home contract and the power of attorney, which was executed only twenty-one days later. We agree that discovery concerning whether King was incompetent to sign the nursing-home agreement should be permitted on remand. Discovery should not be permitted, however, concerning the validity of the power of attorney or the circumstances surrounding its execution. *See* Tenn. Code Ann. § 34-6-208 (providing immunity to health care providers who rely on decisions "made by an attorney in fact who the health care provider believes in good faith is authorized" to make health care decisions).

As the plaintiff argues in her brief, the breach-of-fiduciary-duty claim is based upon her assertion that "in obtaining Ms. Daniel's signature [on the arbitration agreement], Defendants breached fiduciary duties they owed to Mary King." The plaintiff's argument is based upon the implied premise that the nursing home owed King a fiduciary duty *prior to* the time she, through Daniel, signed the contract for admission to the nursing home.

Assuming solely for the purpose of argument that a fiduciary duty *might* arise following a patient's admission to a nursing home, the plaintiff has cited no authority for the finding that a fiduciary duty is owed to a *potential* patient of a nursing home. The record discloses no facts supporting a fiduciary relationship, contractual or otherwise, between King and the nursing home prior to the time King, through Daniel, signed the nursing-home contract. We therefore agree with the intermediate appellate court that the arbitration agreement is not unenforceable on the breach-of-fiduciary-duty ground asserted by the plaintiff. Given our holding that this issue is without merit, any discovery allowed by the trial court on remand should not include discovery on the breach-of-fiduciary-duty issue.

CONCLUSION

For the reasons stated above, we affirm the holdings of the Court of Appeals that the agreement is governed by the Tennessee Uniform Arbitration Act

and that the power of attorney authorized Daniel to sign the arbitration agreement on behalf of King. We also affirm the intermediate appellate court's holding that the arbitration agreement is not unenforceable on the ground that a material term of the agreement is incapable of performance. We likewise affirm the Court of Appeals' holding that the arbitration agreement does not violate federal law. We further hold that a pre-dispute arbitration agreement in a nursing-home contract is not per se invalid as against public policy. In addition, we affirm the intermediate appellate court's holding that the agreement is not unenforceable on the ground that requiring King to sign an arbitration agreement breached a purported fiduciary duty owed to King by the defendants. We vacate, however, the Court of Appeals' judgment insofar as it holds that the arbitration agreement is not an unconscionable contract of adhesion, and we remand for further proceedings on that issue. In light of our remand for further proceedings on the unconscionability issue, we also vacate the intermediate appellate court's instruction to the trial court to enter an order compelling arbitration.

The costs are taxed one-half to the plaintiff/appellant, Dorothy Owens, as Conservator for Mary Francis King, an incapacitated person, and one-half to the defendants/appellees, National Health Corporation d/b/a NHC Healthcare, Murfreesboro; National Healthcorp, L.P.; National Health Realty, Inc.; NHC,

Inc. a/k/a NHC, Inc.-Tennessee; and NHC/OP, L.P., for which execution may issue if necessary.

JANICE M. HOLDER,
JUSTICE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 30, 2007 Session

DOROTHY OWENS, as Conservator of MARY FRANCIS KING, an incapacitated person v. NATIONAL HEALTH CORPORATION ET AL.

Direct Appeal from the Circuit Court for Rutherford County
No. 51377 Robert E. Corlew, Judge

No. M2005-01272-COA-R3-CV – Filed on June 30, 2006

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ALAN E. HIGHERS, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and DONALD P. HARRIS, S.J., joined.

John B. Curtis, Jr., Bruce D. Gill, Chattanooga, TN, for Appellants.

Brian G. Brooks, Richard E. Circeo, Nashville, TN, for Appellee.

OPINION

I. FACTS & PROCEDURAL HISTORY

On August 5, 2003, Mary Francis King ("King") signed a durable power of attorney for health care

("Power of Attorney") naming Gwen C. Daniel ("Daniel") as her attorney-in-fact for health care decisions.[1] In the Power of Attorney, King vested Daniel with the power to assist her in making health care decisions and to make those decisions on King's behalf if she was incapacitated or otherwise unable to make these decisions. The Power of Attorney also included a provision granting Daniel "the power and authority to execute on [her] behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that [the Power of Attorney] authorizes [her] Attorney-In-Fact to assist [her] to make, or to make on [her] behalf."

On August 26, 2003, Daniel and John Smith ("Smith") admitted King ("King") to a nursing home facility, National Health Corporation d/b/a NHC Healthcare-Murfreesboro ("NHC-Healthcare"), in Murfreesboro, Tennessee. When Daniel and Smith admitted King to the nursing home facility, Daniel and Smith signed an admission and financial contract (the "Contract") with NHC-Healthcare. The Contract contained a provision requiring arbitration for any claim brought on behalf of King against NHC-Healthcare. The arbitration provision contained a

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[1] This Court is mindful that the Power of Attorney also named William T. Daniel as King's attorney-in-fact for health care decisions. Based on the language of the Power of Attorney, either Daniel or William T. Daniel could assist King with her health care decisions or make those decisions on her behalf if King was incapacitated. We further note that William T. Daniel was not involved in the events giving rise to this case.

clause stating that "[t]he agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed," which in this case was Tennessee.

On February 10, 2005, Dorothy Owens ("Owens" or "Appellee"), acting as conservator for King, filed suit against NHC-Healthcare, National Healthcorp, L.P. ("NHLP"), National Health Realty, Inc. ("NHR"), NHC, Inc. a/k/a NHC, Inc.-Tennessee ("NHC"), and NHC/OP, L.P. ("NHC/OP" or collectively with NHC Healthcare, NHLP, NHR, and NHC, the "Defendants" or "Appellants") alleging, inter alia, negligence on the part of the Defendants in the care provided to King. In the complaint, Owens alleged that King was of unsound mind during the entire term of her residency at the nursing home. In lieu of an answer, the Defendants filed a motion to compel arbitration and to stay proceedings citing the arbitration provision in the Contract. Thereafter, the circuit court denied the defendants' motion to compel arbitration and stay proceedings.

II. Issue Presented

Appellants have timely filed their notice of appeal and present the following issue for review:

> 1. Whether the circuit court erred when it denied Defendants' motion to compel arbitration and stay proceedings.

For the following reasons, we reverse the decision of the circuit court and remand to the circuit court for the entry of an order compelling arbitration.

III. Standard of Review

"The relationship between an attorney-in-fact and the principal is subject to the laws of agency." ***Stewart v. Sewell,*** No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *14 (Tenn. Ct. App. Apr. 14, 2005) (citing *Kerney v. Aetna Cas. & Sur. Co.*, 648 S.W.2d 247, 252 (Tenn. Ct. App. 1982); 3 Am.Jur.2d *Agency* § 23 (1986)). Thus, "[w]here the authority has been conferred in writing, the nature and extent thereof are questions of law for the court. . . ." 3 C.J.S. *Agency* § 588 (2003). "The interpretation of a contract is a matter of law. . . ." ***Teter v. Republic Parking Sys., Inc.,*** 181 S.W.3d 330, 342 (Tenn. 2005) (citing *Hamblen County v. City of Morristown,* 656 S.W.2d 331, 335-36 (Tenn. 1983)). This Court reviews conclusions of law *de novo* with no presumption of correctness for those findings. ***Union Carbide Corp. v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.,* 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. Discussion

On appeal, Appellants contend that the chancery court erred when it failed to enforce the arbitration provision in the Contract. Specifically, Appellants argue that (1) the court did not have jurisdiction to entertain whether the Contract was enforceable; (2) the court improperly found that Daniel could not waive King's right to a jury trial; and (3) the court

incorrectly found that King would be left without a remedy at law if the arbitration provision were upheld. Appellee contends that the circuit court's denial of Appellants' motion to compel arbitration should be upheld because even if the Contract is valid, the Contract is unenforceable as a matter of law. We address each contention in turn.

A. Jurisdiction

On appeal, Appellants contend that the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 1 *et seq.*, is the controlling law in this case and that under the FAA, the circuit court did not have jurisdiction to determine whether the Contract was valid. We disagree.

Although Appellants contend that the FAA is the controlling law in this case, the Contract stipulated that "[t]his agreement for binding arbitration shall be governed by and interpreted in accordance with the laws of [Tennessee]." By stating that Tennessee law shall govern their agreement for arbitration of "[a]ny claim, controversy, dispute, or disagreement," the parties have indicated that they intended that they would arbitrate all disputes arising out of the Contract to the extent allowed by Tennessee law. ***See Frizzell Constr. Co. v. Gatlinburg, L.L.C.***, 9 S.W.3d 79, 85-86 (Tenn. 1999); ***Whisenhunt v. Bill Heard Chevrolet, Inc.***, No. W2004-01745-COA-R3-CV, 2005 Tenn. App. LEXIS 418, at *17 (Tenn. Ct. App. July 12, 2005); ***City of Blaine v. John Coleman Hayes & Assoc.***, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1999).

"Tennessee law contemplates judicial resolution of contract formation issues." ***Frizzell Contr. Co.***, 9 S.W.3d at 85. Thus, the parties in this case "have indicated their intention not to submit such issues to arbitration." ***Id.*** at 85. As such, the issue of the validity of the Contract as to the formation of the Contract was properly before the circuit court.

B. Validity/Authority of Attorney-in-Fact

Next, on appeal, Appellants contend that the circuit court erred when it determined that Daniel did not have the authority to enter into the Contract on behalf of King.

When an individual executes a power of attorney, that individual "creates a fiduciary relationship [between that individual and] his attorney-in-fact governed by the laws of agency." ***Rogers v. First Nat'l Bank,*** No. M2004-02414-COA-R3-CV, 2006 Tenn. App. LEXIS 97, at *37-38 (Tenn. Ct. App. Feb. 14, 2006) (citing *Stewart v. Stewart,* No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *14-15 (Tenn. Ct. App. Apr. 14, 2005) (perm. app. pending); *In re Estate of Mullins,* No. E2002-02094-COA-R3-CV, 2003 Tenn. App. LEXIS 261, at *4-6 (Tenn. Ct. App. Apr. 3, 2003) (no perm. app. filed); *Rawlings v. John Hancock Mut. Life Ins. Co.,* 78 S.W.3d 291, 297 n.1 (Tenn. Ct. App. 2002); *Eaton v. Eaton,* 83 S.W.3d 131, 134-35 (Tenn. Ct. App. 2001)). Thus, "[o]ne acting pursuant to a durable power of attorney must act in the principal's best interests and within the scope of authority granted by the statute

and the principal." ***Eaton,*** 83 S.W.3d at 134 (footnote omitted).

Pursuant to the terms of the Power of Attorney, Daniel had the authority to execute on King's behalf any waiver, release, or other document which may be necessary to implement health care decisions that Daniel was authorized to assist or to make on King's behalf. Further, the Power of Attorney stated that all terms used in the Power of Attorney shall have the meaning as defined in sections 34-6-201 *et seq.* of the Tennessee Code.

Section 34-6-201(3) of the Tennessee Code defines "health care decision" as "consent, refusal of consent or withdrawal of consent to health care." Tenn. Code Ann. § 34-6-201(3) (2001). Further, section 34-6-201(2) of the Tennessee Code defines "health care" as "any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition. . . ." ***Id.*** § 34-6-201(2) (2001). As such, we conclude that consenting to care at a nursing home is a "health care decision."[2]

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[2] Section 68-11-201(25) of the Tennessee Code defines "nursing home" as "any institution, place, building or agency represented and held out to the general public for the express purpose of providing one (1) or more nonrelated persons who are not acutely ill, but who do require skilled nursing care and related medical services." Tenn. Code Ann. § 68-11-201(25)(A) (2001). Further, section 68-11-201(25) restricts the definition of nursing homes to "facilities providing skilled nursing care and related medical services to individuals, beyond the basic provision of food, shelter and laundry, admitted because of illness,

(Continued on following page)

Thus, our analysis turns on whether Daniel's express authority to execute any necessary waiver, release, or other document on King's behalf to implement a health care decision, i.e., consenting to nursing home care, includes executing an admission contract that includes a waiver of a jury trial.

While no Tennessee court has decided this issue,[3] courts in other jurisdictions have decided similar issues. For example, in ***Garrison v. Superior Court of Los Angeles County,*** 33 Cal. Rptr. 3d 350 (Cal.

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disease or physical infirmity for a period of not less than twenty-four (24) hours per day." ***Id.*** § 68-11-201(25)(B) (2001). Given the definition of a nursing home, consenting to care at a nursing home would be consenting to a service that maintains, diagnoses, or treats an individual's physical or mental condition.

[3] This Court is mindful that several Tennessee cases have decided the issue as to the enforceability of arbitration agreements in a physician-patient agreement and in a nursing home-patient agreement. ***See, e.g., Buraczynski v. Eyring,*** 919 S.W.2d 314, 321 (Tenn. 1996) (determining that agreements to arbitrate between physicians and patients are not against public policy and that the agreement in this case was not unconscionable); ***Howell v. NHC Healthcare-Fort Sanders, Inc.,*** 109 S.W.3d 731 (Tenn. Ct. App. 2003) (holding that the agreement to arbitrate within a nursing home admission contract was unenforceable as it was unconscionable); ***Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.,*** No. E2003-00068-COA-R9-CV, 2003 Tenn. App. LEXIS 957 (Tenn. Ct. App. Dec. 30, 2003) (finding that husband did not have express or apparent authority based on his relationship with his wife to waive his wife's right to a jury trial and that the contract was unenforceable as it was unconscionable). In each of those cases, however, the issue of whether an attorney-in-fact may validly execute an admission contract containing an arbitration agreement based on the authority granted in the power of attorney was not entertained. ***See id.***

Ct. App. 2005), the Court of Appeals of California, Second District, Division Five found that, under California law, an agent may "enter into optional revocable arbitration agreements in connection with placement in a health care facility," finding that it was a "proper and usual" exercise of that agent's powers. ***Id.*** at 360. In *Garrison,* a patient's daughter, upon authority as the patient's attorney-in-fact for health care decisions, admitted the patient into a nursing home. ***Id.*** at 352-54. As part of the admissions process, the attorney-in-fact for health care decisions signed an arbitration agreement on behalf of the patient. ***Id.*** at 353. The power of attorney for health care decisions signed by the patient allowed the attorney-in-fact to make all health care decisions for the patient if the patient became incapacitated to the same extent as the patient would if the patient had the capacity to do so. ***Id.*** at 353-54. The power of attorney also gave the attorney-in-fact the power to execute documents involving the refusal to permit treatment or "to sign '[a]ny necessary waiver or release from liability required by a hospital or physician'" along with permission for reviewing and disclosing the patient's medical information. ***Id.*** at 354.

Likewise, in ***Briarcliff Nursing Home, Inc. v. Turcotte,*** 894 So.2d 661 (Ala. 2004), the Supreme Court of Alabama held that two patients' fiduciary parties, one of whom was one of the patient's attorney-in-fact pursuant to a power of attorney, validly executed admission contracts containing an arbitration provision on behalf of the patients so as to bind

the estates of those patients when bringing a wrongful death claim against the nursing home. ***Id.*** at 668.

Similarly, in ***Sanford v. Castleton Health Care Center, LLC,*** 813 N.E.2d 411 (Ind. Ct. App. 2004), the Court of Appeals of Indiana, Second District found that a patient's attorney-in-fact under a limited durable power of attorney validly executed an admission contract containing an arbitration provision on behalf of the patient that bound the estate of the patient to arbitrate any tort claim against the nursing home, including a wrongful death claim. ***Id.*** at 422. In *Sanford,* the power of attorney granted the attorney-in-fact the authority to "'admit or release [the patient] from any hospital or health care facility.'" ***Id.*** at 414.

Unlike these cases, however, in ***Blankfield v. Richmond Health Care, Inc.,*** 902 So.2d 296 (Fla. Dist. Ct. App. 2005), the Court of Appeals of Florida, Fourth District found that a health care proxy could not sign a waiver of a patient's rights to a jury trial. ***Id.*** at 301. In *Blankfield,* a patient's son, acting as the patient's health care proxy under Florida law, signed an admission agreement that included an arbitration agreement that waived the patient's right to a jury trial. ***Id.*** at 297. The court found that, under the current statutory scheme, the health care proxy did not have the authority to bind the patient to arbitrate any claims she might have against the nursing home as this was not a health care decision. ***Id.*** at 299-301. The Florida statutory scheme did not provide the health care proxy the authority to sign any waiver or

release when implementing health care decisions. ***Id.*** at 301.

Although these cases are not binding on this Court, we find the reasoning in *Garrison, Briarcliff Nursing Home, Inc.,* and *Sanford* persuasive. As such, in this case, we conclude that an attorney-in-fact's authority to execute any necessary waiver, release, or other document for implementing health care decisions includes executing an admission contract which includes an agreement to arbitrate. Necessarily, when attempting to receive health care, an individual must arrange for what services he or she will receive from the health care provider and how he or she will pay for those services. Further, it is not uncommon for those same parties to agree as to which forum they will use to resolve their disputes. Thus, Daniel had the authority to enter into an admission contract that included an agreement to arbitrate. Accordingly, we conclude that the circuit court erred when it found that there was no agreement to arbitrate because Daniel lacked the authority to enter into an admission contract that included an arbitration agreement on behalf of King.

C. Enforceability

On appeal, Appellee has asserted that, even it this Court finds that the Contract is valid, this Court should uphold the circuit court's denial of Appellants' motion to compel arbitration because the Contract is unenforceable under applicable law and is

unenforceable according to its terms. Specifically, Appellee asserts that the Contract is unenforceable because (1) it violates federal law; (2) it is unconscionable; (3) Appellants breached their fiduciary duty to King; and (4) the Contract terminated upon King's discharge. F rther, Appellee asserts that if the Contract is enforceable, it is enforceable against NHC-Healthcare only. Lastly, Appellant contends that the circuit court erred in finding that if the Contract was valid, it is unenforceable because King was left with no remedy at law. We address each contention in turn.

1. Compliance with Federal Law

On appeal, Appellee asserts that if the Contract was valid, it was unenforceable because it violates federal law governing consideration to a nursing home from a patient receiving Medicare and/or Medicaid.

Pursuant to section 1396r(C)(5)(A)(iii) of title 42 of the United States Code, a nursing facility must

> in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this title, any gift, money, donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii) (2005). Likewise, section 483.12(d)(3) of title 42 of the Code of Federal Regulations states that

> [i]n the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3) (2005). Appellee asserts that, pursuant to these provisions, a nursing home may not require a patient receiving Medicare or Medicaid to enter into an agreement to arbitrate in order to be admitted into the nursing home because such agreement constitutes additional consideration.

While no Tennessee court has reached this issue, courts in other jurisdictions have decided this issue. For example, when faced with this same issue in ***Owens v. Coosa Valley Health Care, Inc.***, 890 So.2d 983 (Ala. 2004), the Alabama Supreme Court stated

> requiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance. Rather, an arbitration agreement sets a forum for future disputes; both parties are bound to it and both receive whatever benefits and detriments accompany the arbitral forum. If we

> were to agree with [the plaintiff], virtually any contract term [the plaintiff] decided she did not like could be construed as requiring "other consideration" in order to gain admittance to the nursing home and thus be disallowed by statute.

Id. at 989. Likewise, in ***Broughsville v. OHECC, LLC,*** No. 05CA008672, 2005 Ohio App. LEXIS 6070 (Ohio Ct. App. Dec. 21, 2005), the Court of Appeals of Ohio, Ninth Appellate District, Lorain County concluded that requiring a nursing home admittee receiving Medicare or Medicaid to agree to arbitrate is not charging an additional fee or other consideration. ***Id.*** at *21-22.

Further, in ***Sanford v. Castleton Health Care Center, LLC,*** 813 N.E.2d 411 (Ind. Ct. App. 2004), the Court of Appeals of Indiana, Second District, after employing the doctrine of ejusdem generis and concluding that the general phrase "other consideration" within section 1396r(c)(5)(A)(iii) of title 42 of the United States Code did not include an agreement to arbitrate, found that requring a nursing home admittee to agree to arbitrate did not violate section 1396r(c)(5)(A)(iii). ***Id.*** at 419.

Although these cases are not binding on this Court, we find their rationale persuasive. As such, we conclude that requiring a nursing home admittee that receives Medicare or Medicaid to agree to arbitrate any dispute he or she has with the nursing home is not charging an additional fee or other consideration.

2. Unconscionability

Further, Appellee asserts that if the Contract was valid, it is unenforceable because it is unconscionable.

As this Court has previously stated,

> [u]nconscionability has two recognized ingredients: an absence of the meaningful choice on the part of one of the parties (procedural unconscionability) and contract terms which are unreasonably favorable to the other party (substantive unconscionability). *Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445, 449 (D.C. Cir. 1965).

Elliott v. Elliott, No. 87-276-11, 1988 Tenn. App. LEXIS 242, at *12 (Tenn. Ct. App. Apr. 13, 1988). Further,

> [a] court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. *Hume v. United States,* 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889); *Christian v. Christian,* 42 N.Y.2d 63, 365 N.E.2d 849, 396 N.Y.S.2d 817 (1977). In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any

> opportunity for a meaningful choice, the contract should be found unconscionable. *In re Friedman,* 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978); *Collins v. Uniroyal Inc.,* 126 N.J. Super. 401, 315 A.2d 30 (1973), aff'd 64 N.J. 260, 315 A.2d 16 (1974). *See, e.g.,* G.S. 25A-43(c).

Haun v. King, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (quoting *Brenner v. Little Red School House, Ltd.,* 274 S.E.2d 206, 210 (N.C. 1981)). The question of whether a contract or provision thereof is unconscionable is a question of law. ***Taylor v. Butler,*** 142 S.W.3d 277, 284-85 (Tenn. 2004) (citing *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.,* 709 F.2d 427, 435 n.12 (6th Cir. 1983)).

In ***Howell v. NHC Healthcare-Fort Sanders, Inc.,*** 109 S.W.3d 731 (Tenn. Ct. App. 2003), this Court elaborated on the issue of unconscionability of an agreement to arbitrate in a nursing home context, stating:

> In *Buraczynski,* the Supreme Court addressed the issue of the enforceability of an arbitration agreement between a patient and doctor, and discussed the factors which should be analyzed in dealing with this issue. The Court said the agreement in that case was a contract of adhesion because it was offered to the patient on a "take it or leave it" basis, and because the doctor was in a position of greater bargaining power. *Id.* The Court noted, however, that while contracts of adhesion are not favored, the simple

fact that the contract was one of adhesion does not necessarily render it unenforceable. *Id.* The Court then observed that enforceability "generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable." *Id.* 919 S.W.2d at 320.

The Court provided examples of arbitration agreements which were considered unconscionable or oppressive to the "weaker" party, such as where the arbitration clause was contained within a clinic admission form and gave the patient no option to revoke the agreement and regain the right to a jury trial. *Id.* 919 S.W.2d at 320, citing *Pepper,* 101 Nev. 105, 693 P.2d 1259 (Nev. 1985). The Court stated that "courts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden . . . and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment." *Id.* 919 S.W.2d at 321.

The Court then examined the arbitration agreement at issue in *Buraczynski,* and concluded it was not oppressive or unconscionable because it was a stand-alone, one page contract, with an attached explanation of its purpose that encouraged the patient to ask questions, and which contained a "ten-point capital letter red type, directly above

the signature line that 'by signing this contract you are giving up your right to a jury or court trial' on any medical malpractice claim." *Id.* 919 S.W.2d at 321. The agreement also provided that it could be revoked by the patient within thirty days. *Id.*

In *Cooper v. MRM Investment Co.,* 199 F. Supp. 2d 771 (M.D. Tenn. 2002), an arbitration was held unenforceable because the circumstances were such that the employee signed the agreement with the employer and the agreement contained no language stating the employee was giving up her right to a jury trial. That Court recognized that "the waiver of the right to a jury trial must be both knowing and clear". Further, the Court relied upon the fact that the employer had much greater bargaining power, and ultimately found that the agreement was oppressive and unconscionable. *Id.*

This Court held in *Brown v. Karemor International, Inc.,* 1999 Tenn. App. LEXIS 249 (Tenn. Ct. App. April 19, 1999), that the reasonableness of the provision could not be determined simply by looking at the agreement itself, and that the defendant who was seeking to enforce the provision had the burden of showing the parties "actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances." *Id.*

Howell, 109 S.W.3d at 733-34.

We are cognizant that in each case determining the unconscionability of an agreement to arbitrate in a health care situation, the courts in those cases first determined whether the contract was one of adhesion. In this case, the circuit court made no factual findings as to whether the Contract was one of adhesion. Although no findings were made as to whether the Contract was an adhesion contract, even assuming that the Contract is an adhesion contract, we conclude that the arbitration provision within the Contract is not unconscionable. Although the arbitration provision is located on pages nine and ten of the Contract, the section heading reads in bold: "DISPUTE RESOLUTION PROCEDURE (WHICH INCLUDES JURY TRIAL WAIVER)." Further, the statement "BY AGREEING TO ARBITRATION OF ALL DISPUTES, BOTH PARTIES ARE WAIVING A JURY TRIAL FOR ALL CONTRACT, TORT, STATUTORY, AND OTHER CLAIMS" is included prominently within the section in bold and in all capital letters. The arbitration provision, however, does not provide an explanation of the arbitration proceedings. At the end of the arbitration section, the patient or the patient's legal representative must sign acknowledging that they agree to the arbitration provisions described above, that the provisions were explained to him or her, and that he or she understands that he or she is waiving their right to a jury trial. Most importantly, the arbitration agreement did not change the nursing home's duty to use reasonable care in treating King, nor limit the nursing home's liability for any breach of that duty, "but merely

shifted the disputes to a different forum." ***Buraczynski v. Eyring,*** 919 S.W.2d 314, 321 (Tenn. 1996).

3. Breach of Fiduciary Duty

Next, Appellee asserts that if the Contract was valid, it was unenforceable because Appellants had a fiduciary duty to place King's interests above theirs and "to not entice her or her family to waive her constitutional rights in order to receive medical care." Therefore, Appellee contends that Appellants exerted some undue influence over King so that the Contract should be rendered unenforceable.

"[T]he existence of a confidential or fiduciary relationship, together with a transaction by which the dominant party obtains a benefit from the other party, gives rise to a presumption of undue influence. . . ." ***Matlock v. Simpson,*** 902 S.W.2d 384, 385 (Tenn. 1995).

In this case, even assuming a fiduciary relationship exists between the parties, we cannot say that Appellants derived any profit from or advantage from having King arbitrate any claim she may have against Appellants. As we have stated earlier in this Opinion, an agreement to arbitrate is not other consideration or an additional fee. It is a neutral provision that establishes the forum for future disputes between the parties. Further, Appellee does not assert that electing to use this type of forum for future disputes unfairly advantages Appellants. Rather, Appellee contends that, if Appellant must

arbitrate her claims, Appellant must pay a fee to arbitrate. We cannot see how Appellants gain an advantage or derive a profit from Appellee paying a fee to arbitrate. As such, we conclude that there has been no undue influence as to render the Contract unenforceable.

4. Termination Upon Discharge

Appellee also contends that, if the Contract is valid, that it is unenforceable because it terminated upon King's discharge.

Although, generally, a party to a contract is not bound to the terms of the contract once the contract has terminated, 17B C.J.S. *Contracts* § 448 (1999), when one party to a contract has a dispute against another party to the contract arising under the contract, the parties shall be bound to the terms of the contract when resolving the dispute even though the contract has been terminated, ***S. Cent. Power Co. v. Int'l Bhd. of Elec. Workers, Local Union 2359,*** 186 F.3d 733, 738-40 (6th Cir. 1999); ***see also Litton Fin. Printing Div. v. NLRB,*** 501 U.S. 190, 205-06 (1991); ***Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union,*** 430 U.S. 243, 255 (1977). A dispute arises under a contract when the "majority of the material facts and occurrences" arise before the contract's expiration. ***S. Cent. Power Co.,*** 186 F.3d at 740. In this case, while the Contract terminated when King was discharged from NHC-Healthcare pursuant to the terms of the Contract, all

the underlying occurrences alleged by Appellee that she claims give rise to her negligence action occurred before the Contract was terminated. Pursuant to the terms of the Contract, any claim arising under tort or contract as a result of the performance of the Contract by NHC-Healthcare, which included any medical care provided to King, were to be arbitrated. Accordingly, we conclude that although the Contract terminated upon King's discharge, the parties were required to arbitrate any tort or contract claim arising under the Contract.

5. Agreement Applying Only to NHC-Healthcare

Fifth, Appellee asserts that, if the Contract is valid, only NHC-Healthcare may rely on the arbitration section as it was the only one of the Appellants who was a party to the Contract.

In this case, Appellee brought suit against NHLP, NHR, NHC, and NHC/OP based on their respective ownership of NHC-Healthcare.

"When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." ***J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.***, 863 F.2d 315, 320-21 (4th Cir. 1988); ***see also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.***, 10 F.3d 753, 756-58 (11th Cir. 1993).

Given the facts of this case, if this Court were to allow Appellee to bring suit in circuit court against NHLP, NHR, NHC, and NHC/OP while arbitrating her claims against NHC-Healthcare, the arbitration proceedings would essentially be rendered meaningless and this State's policy in favor of arbitration would be frustrated. ***See Sam Reisfield & Son Import Co. v. S.A. Eteco,*** 530 F.2d 679, 681 (5th Cir. 1976) (citing *Lawson Fabrics, Inc. v. Akzona, Inc.*, 355 F. Supp. 1146 (S.D.N.Y.), *aff'd,* 486 F.2d 1394 (2d Cir. 1973)).

As such, we conclude that, as a matter of law, all of the Appellants may rely on the arbitration section of the Contract.

6. Remedy at Law

Lastly, Appellant asserts that the circuit court improperly concluded that if the Contract was valid, Appellee was left without a remedy at law. Appellee contends that if the Contract is valid, the Contract is unenforceable because Appellee would be left without a remedy at law.

In its letter to the parties that it incorporated into its opinion by reference, the circuit court noted that the parties have stipulated that neither arbitral forum designated in the Contract would conduct an arbitration for Appellee's claims. Additionally, the circuit court stated that even if it found the Contract valid, it found that the Contract would be unenforceable because Appellee was left without a remedy at

law. Appellee states that because the remedy provided for in the Contract is unavailable, the Contract is unenforceable as a matter of law. Alternatively, Appellants contend on appeal that under the FAA and the Tennessee Uniform Arbitration Act provide a remedy in this situation.

As we have stated earlier in this Opinion, Tennessee law governs the agreement to arbitrate in this case. Section 29-5-304 of the Tennessee Code states that

> [i]f the arbitration agreement provided a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one (1) or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Tenn. Code Ann. § 29-5-304 (2000).

Accordingly, we conclude that Appellee is not left without a remedy at law as she can apply to the circuit court for the appointment of one or more arbitrators.

V. CONCLUSION

For the foregoing reasons, we reverse the decision of the circuit court and remand to the circuit court for the entry of an order compelling arbitration. Costs of this appeal are taxed to the appellee, Dorothy Owens, as Conservator of Mary Francis King, an incapacitated person, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE,

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
June 6, 2007 Session

DOROTHY OWENS, as Conservator of MARY FRANCIS KING, an incapacitated person v. NATIONAL HEALTH CORPORATION ET AL.

Circuit Court for Rutherford County No. 51377

No. M2005-01272-SC-R11-CV –
Filed February 7, 2005

ORDER GRANTING IN PART AND DENYING IN PART APPELLEES' PETITION TO REHEAR

The appellees, NHC/OP, L.P., National Health Realty, Inc., NHC, Inc., a/k/a NHC, Inc., Tennessee, and National Health Corporation, have filed a petition to rehear the opinion of this Court filed on November 8, 2007. By order of January 4, 2008, appellant, Dorothy Owens, was ordered to file a response to the petition to rehear. Appellant's response was filed on January 16, 2008.

In their petition, the appellees allege that the Court improperly allowed discovery as to the principal's competence to sign the power of attorney.

Upon due consideration, the Court concludes that appellees' petition to rehear is well-taken as to this issue and should therefore be granted. The petition to rehear is denied as to the remainder of the issues.

It appearing to the Court from appellees' Petition to Rehear and appellant's response that footnote 4 of its Opinion filed November 8, 2007, should be modified,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the attached Opinion be and the same is hereby substituted for that Opinion filed in this cause on November 8, 2007, without change to this Court's judgment entered contemporaneously with the filing of the original Opinion on November 8, 2007, and without the further taxing of costs.

PER CURIAM

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(2)

No. 07-1380

FILED
JUN 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DOROTHY OWENS, as Conservator of Mary Francis King, an incapacitated person,

Petitioner,

v.

NATIONAL HEALTH CORPORATION d/b/a NHC HEALTHCARE, MURFREESBORO; NATIONAL HEALTHCORP, L.P.; NATIONAL HEALTH REALTY, INC.; NHC, INC. a/k/a NHC, INC. – TENNESSEE; NHC/OP, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The Tennessee Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the Tennessee Supreme Court, which holds, consistent with every other court having considered the issue, that a mandatory arbitration agreement executed contemporaneously with a contract for nursing home care does not violate federal statutes and regulations prohibiting the charging of other consideration for patients entitled to medical assistance through Medicare and Medicaid?

PARTIES TO THE PROCEEDINGS

The following persons or entities participated in the proceedings an the Tennessee Supreme Court and the trial court:

Plaintiff/Petitioner:

Dorothy Owens, as Conservator of Mary Francis King, an incapacitated person

Defendants/Respondents:

National Health Corporation d/b/a NHC Healthcare, Murfreesboro

National Healthcorp, L.P.

National Health Realty, Inc.

NHC, Inc. a/k/a NHC, Inc. – Tennessee

NHC/OP L.P.

Defendant:

National HealthCare Corporation

Defendant National HealthCare Corporation was added as a party defendant during the sixty (60) day interim period between the decision of the Tennessee Court of Appeals and the Petitioner's application for permission to appeal to the Tennessee Supreme Court. Because National HealthCare Corporation was not part of Respondents' original Motion to Compel Arbitration, it was not a party to the appeal. Nevertheless, because of the vested interest of National HealthCare Corporation in the decision by the Tennessee Supreme Court, as well as any decision by this Court, the parent/subsidiary status is stated for the purpose of full disclosure.

STATEMENT REGARDING PARENT/SUBSIDIARY STATUS

Respondent National Health Corporation d/b/a NHC Healthcare, Murfreesboro does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Respondent National Healthcorp, L.P. no longer exists as a legal entity.

Respondent National Health Realty, Inc. no longer exists as a legal entity.

Respondent NHC, Inc. a/k/a NHC, Inc. – Tennessee no longer exists as a legal entity.

Respondent NHC/OP, L.P. does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

Defendant National HealthCare Corporation does not have a parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Plaintiff filed suit in the Circuit Court for Rutherford County, Tennessee alleging, *inter alia*, negligence on the part of the Defendants in the care and services provided to Mary Francis King (hereinafter, "King"), an otherwise incapacitated person. At the time of the alleged acts, King was a resident of a nursing home facility owned by National Health Corporation d/b/a NHC HealthCare, Murfreesboro in Murfreesboro, Tennessee. The Plaintiff, in her representative capacity as conservator of King, filed her Complaint with a jury demand on February 10, 2005. In lieu of filing an Answer or other responsive pleading, Defendants filed a Motion to Compel Arbitration and Stay Proceedings on March 17, 2005. To date, Defendants have not filed a formal response to Plaintiff's allegations, which are denied.

Defendants' Motion to Compel Arbitration and Stay Proceedings was premised upon an arbitration provision in an admission and financial contract signed by Gwyn Daniel and John Smith on August 26, 2003 when admitting King to the Murfreesboro facility. Ms. Daniel was the attorney-in-fact under a durable power of attorney for health care executed by King on August 5, 2003.

On April 8, 2005, a hearing was held in the Circuit Court of Rutherford County on the Defendant's Motion to Compel Arbitration. Following oral argument of the respective counsel, the court took the matter under advisement but expressed reservations,

inter alia, as to whether the attorney-in-fact had authority to waive King's constitutional right to a jury trial.

On April 18, 2005, the trial court corresponded with counsel and advised of its decision to deny the Defendants' motion. The letter was incorporated by reference into an Order denying the Defendants' Motion to Compel Arbitration on May 3, 2005. The trial court's denial of the Motion to Compel Arbitration was premised upon two exclusive grounds, namely that the attorney-in-fact lacked the legal authority to execute an arbitration agreement in securing long-term care, as well as a finding that the arbitral entities listed in the agreement were no longer available, thereby depriving the Plaintiff of a remedy at law. An appeal followed.

On June 30, 2006, the Tennessee Court of Appeals reversed and remanded the decision of the trial court, finding that the attorney-in-fact under the durable power of attorney for healthcare had authority to execute an arbitration agreement on behalf of the resident, and that the unavailability of the arbitral entities listed in arbitration agreement did not render the Plaintiff without a remedy at law. The Court of Appeals further addressed a myriad of other grounds asserted by Plaintiff in opposition to the arbitration agreement, including its purported illegality in light of Medicare/Medicaid statutes and regulations prohibiting "other consideration" as a condition of admission. The Court of Appeals, relying upon

persuasive case law from other state courts, found the arbitration agreement did not violate federal law.

The Plaintiff thereafter filed an application for appeal to the Tennessee Supreme Court, which was subsequently granted. The Tennessee Supreme Court delivered its opinion on November 8, 2007, affirming in part and vacating in part the decision by the Court of Appeals. Unrelated to the issue before this Court, the Tennessee Supreme Court later granted in part and denied in part the Defendants' Petition for Rehearing, with a modified opinion following.

In short, the Tennessee Supreme Court affirmed the decision by the Court of Appeals in finding that the execution of a mandatory arbitration agreement does not constitute "other consideration" as contemplated by pertinent federal statutes and regulations governing Medicare and Medicaid. Contrary to Petitioner's argument, the Tennessee Supreme Court did not simply agree with the Court of Appeals, but rather examined all reported cases of other jurisdictions that had considered the same argument. While acknowledging that the other cases were not binding, the Tennessee Supreme Court nevertheless found their rationale persuasive, and concluded that requiring a Medicare/Medicaid recipient to agree to binding arbitration when being admitted to a nursing home does not constitute an additional fee or other consideration prohibited by federal law.

STATEMENT OF FACTS

On August 5, 2003, Mary Francis King executed a Durable Power of Attorney for Health Care wherein she named William T. Daniel and Gwyn C. Daniel as her attorneys-in-fact. As evidenced by language in the Power of Attorney, the document was to be durable, thereby surviving King's incapacitation, and included authority to engage medical providers. The Power of Attorney further provides "I grant to my Attorney-in-Fact the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my Attorney-in-Fact to assist me to make, or to make on my behalf."

On August 26, 2003, Gwyn Daniel and John Smith executed an Admission and Financial Contract (hereinafter, "Contract") with National Health Corporation d/b/a NHC Healthcare, Murfreesboro for the purpose of admitting King as a patient to the facility. The Contract, among its other provisions, including a separate section entitled "**DISPUTE RESOLUTION PROCEDURE (WHICH INCLUDES JURY TRIAL WAIVER).**" (emphasis in original) Pursuant to the terms of that section, the parties to the Contract agreed that all disputes would be submitted to either mediation or arbitration. Specifically, the Contract reads "**BY AGREEING TO ARBITRATION OF ALL DISPUTES, BOTH PARTIES ARE WAIVING A JURY TRIAL FOR ALL CONTRACT, TORT,**

STATUTORY, REGULATORY, AND OTHER CLAIMS." (emphasis in original)

In acknowledgement of the arbitration language, both Gwyn Daniel and John Smith signed a separate box wherein they agreed to be bound by the arbitration language and stated that the terms regarding arbitration had been explained to them.

On February 10, 2005, Plaintiff Dorothy Owens instituted the instant action by filing a Complaint in the Circuit Court of Rutherford County, Tennessee alleging, among other things, negligence on the part of the named Defendants in causing personal injury to King.

SUMMARY OF ARGUMENT

Respondents submit that any review of the decision by the Tennessee Supreme Court is unwarranted. As conceded by the Petitioner, no court, whether federal or state, has ever held that a mandatory arbitration agreement violates Medicare/Medicaid law and regulations regarding the prohibition of "other consideration." Accordingly, there is no conflict of authority requiring intervention by this Court. Moreover, contrary to Petitioner's argument, the issue does not present an important question of federal law, evidenced in part by the relatively few cases where the issue has ever been raised.

Respondents further submit that review by this Court of the decision by the Tennessee Supreme Court is improper because any reliance upon Tennessee interpretation of "other consideration" could result in inconsistent application of the same federal law and regulations because of variances in differing state laws. Where other states may employ an altogether different definition of "consideration," this Court's decision would arguably only apply to Tennessee's definition on the question.

Lastly, Respondents submit that various interpretations by federal agencies charged with enforcing the statute and regulation in question have found that "other consideration" must be monetary in nature, and that an arbitration agreement in a nursing home contract does not violate federal law. These interpretations are entitled to considerable weight in interpreting the subject language, particularly where Congress has not addressed the issue.

ARGUMENT

1. The Arbitration Agreement Does Not Constitute Other Consideration In Violation Of Federal Law.

The Petitioner argues that execution of the arbitration agreement constitutes "other consideration" as a precondition of admission to the nursing home in violation of federal law governing Medicare and Medicaid. Notably, the Petitioner's Writ contains

a dearth of case law interpreting an arbitration clause in a nursing home admission contract to be inconsistent with those federal regulations. To the Contrary, as evidenced by the well-reasoned decision of the Tennessee Supreme Court, persuasive case law from other jurisdictions demonstrates the weight of authority is contrary to the Petitioner's argument.

In deciding this issue, the Tennessee Supreme Court closely examined the language of the applicable federal statute and regulation. The federal statute provides, in pertinent part, that a participating nursing home in the federal Medicaid program must:

> in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money, donation, or other **consideration** as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii) (Supp. 2007) (emphasis added). Language in the federal regulation closely tracks that of the federal code:

> In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or

> other consideration as a precondition of admission, expedited admission or continued stay in the facility.

42 C.F.R. § 483.12(d)(3) (2006) (emphasis added).

The Tennessee Supreme Court noted that other jurisdictions have rejected Petitioner's argument. The court principally relied upon a decision by the Alabama Supreme Court in *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004), wherein the court stated:

> [R]equiring a nursing-home admittee to sign an arbitration agreement is not charging an additional fee or other consideration as a requirement to admittance. Rather, an arbitration agreements sets a forum for further disputes; both parties are bound to it and both receive whatever benefits and detriments accompany the arbitral forum. If we were to agree with [the plaintiff], virtually any contract term [the plaintiff] decided she did not like could be construed as requiring "other consideration" in order to gain admittance to the nursing home and thus be disallowed by statute.

Id. at 898. The Tennessee Supreme Court further relied upon the holding of the Indiana Court of Appeals in *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004). In construing the same statute in the context of the same argument, the *Sanford* court undertook to apply tools of statutory construction, namely the principle

of *ejusdem generis*, which provides that a general term in a statute that follows a series of specific items must be limited in scope to the same type as those listed. *Id.* In this instance, the *Sanford* court noted that preceding the prohibition against "other consideration," the statute specifically lists gifts, money and donations. *Id.* The court reasoned that an arbitration agreement is not tantamount to a gift, money, or donation, and therefore the prohibition was inapplicable. *Id.*

Finally, the Tennessee Supreme Court cited and selectively quoted from other cases addressing the same issue, including *Gainesville Health Care Center v. Weston*, 857 So. 2d 278, 288 (Fla. Ct. App. 2003); and *Broughsville v. OHECC, LLC*, No. 05CA008672, 2005 WL 3483777, *8 (Ohio Ct. App. Dec. 21, 2005), both of which found that agreements to arbitrate are not additional consideration in violation of federal regulations prohibiting the same.

The reasoning by the Alabama Supreme Court in *Owens* is particularly persuasive insomuch that the court extrapolated the Petitioner's argument to demonstrate its likely absurd result. If "other consideration" as prohibited by federal law is extended to any mutual promise or obligation on the part of the nursing home admittee, then any term to the contract aside from the charges to be incurred would potentially be illegal. The consequences would be enormous and would create chaos detrimental to nursing home residents and facilities alike, while subverting the clear intent of Congress. The interpretation advocated

by Petitioner would likewise promote abuse of the federal law, such as in this instance, where a party, *post hoc*, would seek to render an entire agreement illegal so as to avoid a mutual obligation due to a change in circumstances.

The *Sanford* reasoning is likewise persuasive. Only recently this Court employed the principle of *ejusdem generis* in construing the Federal Arbitration Act in *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1404-1405 (2008). In deciding the exclusive grounds upon which a party could seek relief from an arbiter's award, this Court noted that "the old rule of ejusdem generis has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Id.* at 1404.

In this instance, it is evident that the specifics preceding "other consideration," namely gift, money and donation, in both the federal statute and regulation are not comparable to an arbitration agreement, which merely speaks to the forum in which the parties agree to resolve disputes. Both the statute and the regulation clearly contemplate that "other consideration" will encompass something of monetary value for the purpose of inducing admittance to a nursing home or continued residence at the same.

Petitioner merely glosses over this point by stating that if Congress had intended to mean "financial consideration," then it could have employed that

language in lieu of "other consideration." (Petition, p. 18) However, "financial consideration" alone may not have included the broadest reach of prohibition that Congress was intending to address where, for example, a facility might obligate an admittee to donate personal property to gain admittance. Personal property arguably would not be financial consideration if it had not been reduced to negotiable instruments.

Respondents submit that in this instance, the arbitration agreement merely provided that the parties were mutually agreeing to shift all disputes to an alternative forum, which in no way deprives the resident of an ability to seek redress for any purported harms.

2. Petitioner's Writ Would Require This Court To Afford Unfettered Deference To Tennessee's Legal Definition Of Consideration

In her Writ, Petitioner asserts "It is unquestionable that Tennessee law considers the waiver of a right to be consideration." (Petition, p. 4) Petitioner then glosses that under any "common understanding of the word, giving up a right in exchange for some other product or service is 'consideration.'" (*Id.*) However, Petitioner relies upon nothing other than Tennessee's interpretation of "consideration" as grounds for her p[illegible]ition.

Under our federalist system of government, federal courts are obliged to defer to state courts

regarding interpretation of a state's own law. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). However, federal courts owe no deference to a state court's interpretation of a federal statute. *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997)

In this instance, provided this Court granted Petitioner's Writ and found that Tennessee's interpretation of consideration was in some manner binding on the federal statute and regulation, then the unintended consequence would mean that the language in question would be subject to the interpretation of each of the respective states. Tennessee's interpretation of "consideration" may not be consistent with that of Alabama or California, for example, thereby creating inconsistency in the application of federal law. That is counter to our federalist system, whereby the states are obliged to defer to federal law where a federal question is involved. That said, Petitioner's reliance upon Tennessee law should not give grounds to this Court to decide an important question of federal law.

3. Federal Agencies Have Not Interpreted The Subject Regulation Consistent With Petitioner's Argument

Lastly, after an exhaustive review of the history of the Omnibus Budget Reconciliation Act of 1987, which encompasses the statute, and therefore the regulation in question, Petitioner asserts that the

federal agency charged with enforcement has been "evasive and equivocating" regarding whether an arbitration agreement may be required as a condition of admission. This characterization is based upon language in a *Memorandum* from the Centers for Medicare and Medicaid Services, which is reproduced only in part in Petitioner's Writ. (Petition, p. 19-20) Notably, the "evasive and equivocating" description of the *Memorandum* is derived exclusively from scholarship addressing this issue, the title of which clearly demonstrates the agenda of its author: *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*. (Petition, p. 19-20)

Notwithstanding the foregoing, Respondents submit that interpretations by federal agencies are actually in accord with the reasoning of all courts that have considered this issue. Since no federal court has addressed this matter, then the interpretations of the federal agencies should be given considerable deference. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court noted:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress

has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

* * *

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting polices, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

" . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative

> history that the accommodation is not one that Congress would have sanctioned."

Id. at 842-845. (internal citations omitted).

As mentioned above, Petitioner's Writ selectively reproduces from the *Memorandum* issued by the Centers for Medicare and Medicaid Services. In the memo, dated January 9, 2003, the director of the Survey and Certification Group addressing "Binding Arbitration in Nursing Homes" noted:

> The purpose of this memorandum is to address the Centers for Medicare and Medicaid Services' (CMS) position regarding binding arbitration between nursing homes and prospective or current residents, in response to recent marketplace practices. Specifically, this memorandum addresses the use of an agreement that requires disputes between a prospective or current resident and the nursing home be resolved through binding arbitration either as a condition of admission or a condition of remaining in the nursing home. Under these agreements, the resident gives up his or her right to sue the nursing home through the judicial process.
>
> CMS believes that its primary focus should be on the quality of care actually received by nursing home residents that may be compromised by such agreements, for the reasons set out below. **Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home. Under**

> **Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted** subject to the concerns we have where Federal regulations may be implicated. . . .

Memorandum from the Centers for Medicare & Medicaid Services to the Survey and Certification Group Regional Office Management (G-5) State Survey Agency Directors (Jan. 9, 2003) (emphasis added).

The memo, appended to this Brief, goes on to further outline potential concerns regarding discharge based on an existing resident's failure "to sign or comply with a binding arbitration agreement" and notes that current residents are not obligated to sign new admission documents containing a binding arbitration agreement. *Id.*

The foregoing interpretation clearly evidences that arbitration agreements with prospective patients are not illegal *per se* due to participation in the Medicare/Medicaid program by a nursing home facility, contrary to Petitioner's argument.

With respect to the specific regulation at issue, the Department of Health and Human Services has also commented upon its intended purpose. The Department found that

> We believe that revised § 483.12(d)(3) only prohibits the nursing facility from charging/soliciting or accepting/receiving gifts from or on behalf of a Medicaid recipient when these

> gifts are intended to purchase preferential treatment for a Medicaid recipient, presumably over other Medicaid recipients. Gifts given by or on behalf of Medicaid recipients for purposes other than to gain admission, expedited admission or continued stay are not prohibited.

Rules and Regulations Department of Health and Human Services, Health Care Financing Administration, RIN 0938-AD12, Medicare and Medicaid; Requirements for Long Term Care Facilities (Sept. 26, 1991), 56 FR 48826-01.

This interpretation by the Department demonstrates the Congressional intent in prohibiting gifts, money, donations or other consideration where the same is solicited to gain more favorable treatment or admission. In this instance, every resident, whether on Medicare/Medicaid or not, is obliged to execute the arbitration agreement to gain admittance.

Lastly, a recently published draft opinion from the Office of the Inspector General regarding Supplemental Compliance Program for Nursing Home Facilities discusses the regulation at issue. The OIG draft notes:

> As a condition of its Medicare provider agreement and under applicable Medicaid regulations and a criminal provision precluding supplementation of Medicaid payment rates, a nursing facility must accept the applicable Medicare or Medicaid payment (including any

> beneficiary coinsurance or copayments authorized under those programs), respectively, for covered items and services as the complete payment. For covered items and services, **a nursing facility may not charge a Medicare or Medicaid beneficiary, or another person in lieu of the beneficiary, any amount in addition to what is otherwise required to be paid under Medicare or Medicaid** (i.e., a cost-sharing amount). For example, an SNF may not condition acceptance of a beneficiary from a hospital upon receiving payment from the hospital or the beneficiary's family in an amount greater than what the SNF would receive under the PPS. **For Medicare and Medicaid beneficiaries, a nursing facility may not accept supplemental payments, including, but not limited to, cash and free or discounted items and services, from a hospital or other source merely because the nursing facility considers the Medicare or Medicaid payment to be inadequate (although a nursing facility may accept donations unrelated to the care of specific patients). The supplemental payment would be a prohibited charge imposed by the nursing facility on another party for services that are already covered by Medicare or Medicaid.**

Notice, Department of Health and Human Services, Office of Inspector General, Draft OIG Supplemental Compliance Program Guidance for Nursing Facilities (Apr. 16, 2008), 73 FR 20680-02 (emphasis added).

Based upon the foregoing interpretations of federal law governing nursing home participating in Medicare/Medicaid program, it is evident that the executive departments charged with enforcing the same do not find mandatory arbitration agreements for prospective patients to be prohibited. Also, the federal agencies' interpretation of "other consideration" makes it clear that the intent is to avoid preferential treatment in exchange for something of value in the manner of a gift or donation having some remunerative value.

CONCLUSION

In the absence of any authority to support her Petition, Petitioner has not established any compelling reason for this Court to consider the issue *sub judice*. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

June 5, 2008

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Centers for Medicare & Medicaid Services
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Baltimore, Maryland 21244-1850

Center for Medicaid and State Operation

[LOGO]

Ref: S&C-03-10

DATE: January 9, 2003

FROM: Director
Survey and Certification Group

SUBJECT: Binding Arbitration in Nursing Homes

TO: Survey and Certification Group Regional Office Management (G-5) State Survey Agency Directors

The purpose of this memorandum is to address the Centers for Medicare & Medicaid Services' (CMS) position regarding binding arbitration between nursing homes and prospective or current residents, in response to recent marketplace practices. Specifically, this memorandum addresses the use of an agreement that requires disputes between a prospective or current resident and the nursing home be resolved through binding arbitration either as a condition of admission or a condition of remaining in the nursing home. Under these agreements, the resident gives up his or her right to sue the nursing home through the judicial process.

CMS believes that its primary focus should be on the quality of care actually received by nursing home

residents that may be compromised by such agreements, for the reasons set out below. Under Medicare, whether to have a binding arbitration agreement is an issue between the resident and the nursing home. Under Medicaid, we will defer to State law as to whether or not such binding arbitration agreements are permitted subject to the concerns we have where Federal regulations may be implicated. Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements.

Survey and Certification Guidance:

1. If a nursing home discharges a resident or retaliates due to an existing resident's failure to sign or comply with a binding arbitration agreement, the State and Region may initiate an enforcement action based on a violation of the rules governing resident discharge and transfer. A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. §483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident. None of the conditions specified in the regulation permit a facility to discharge or transfer a resident based on his or her failure to comply with the terms of a binding arbitration agreement. Additionally, a facility that retaliates against a resident who fails to sign or comply with the agreement is subject to an enforcement response based on its failure to comply with the obligation to furnish an abuse free environment under 42 C.F.R. §483.13(b) or

other requirements bearing on the facility's obligation to provide quality care to all residents. The existence of a binding arbitration agreement does not in any way affect the ability of the State survey agency or CMS to assess citations for violations of certain regulatory requirements, including those for Quality of Care.

2. The Medicaid appeal procedures at 42 C.F.R. §431.200 et seq. apply to discharges or disputes of eligibility between the resident and the State Medicaid Agency and are not affected by a binding arbitration agreement.

Effective Date: This policy is in effect immediately.

Training: This policy should be shared with all appropriate survey and certification staff, their managers, and the state/regional office training coordinator.

/s/
Steven A. Pelovitz